88-707

Supreme Court, U.S.
FILED
OCT 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EILEEN CONWAY,

Petitioner,

vs.

FIRST TRUST COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE NORTH DAKOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Eileen Conway
Attorney pro se
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Germantown, Tennessee 38138
(901) 754-1057

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QUESTIONS PRESENTED FOR REVIEW

As a matter of law, did the North Dakota Supreme Court violate the substantive and procedural due process rights and equal protection rights of Conway, beneficiary of the Estate of Guy Kjorvestad, Sr. (who died on January 27, 1973) when it "repealed in the interest of justice" the Probate Code of the North Dakota Century Code and rejected the Transition Provision of the Uniform Probate Code but instead applied the Uniform Probate Code which was not adopted until July 1, 1975, almost two and a half years after the death of Guy Kjorvestad, Sr., a farmer?

As a matter of law, did the North Dakota Supreme Court violate the substantive and procedural due process rights of Conway when it imposed ten financial penalties against her for exercising her right of

due process of law and equal protection of the Probate Statutes of the North Dakota Century Code because she contested fraudulent accounts of the combined Estate of Guy Kjorvestad, Sr. and the Estate of Selma Kjorvestad?

As a matter of law, did the North Dakota Supreme Court violate her substantive and procedural due process rights afforded by the Fourteenth Amendment and violate her right of protection from "excessive fines imposed, nor cruel and unusual punishments inflicted" afforded by the Eighth Amendment, when it imposed ten financial penalties against Conway because her appeals of secret, counterfeit court orders approving fraudulent accounts of the combined estates and secret, underground hearings in the Nelson County Underground Probate Court, executed by a former North Dakota Supreme Court Justice were

"frivolous, flagrantly groundless and taken in bad faith?

As a matter of law, did the North Dakota Supreme Court err in denying Conway a fair trial, depriving Conway the right to inspect the Docket File of the Estate of Guy Kjorvestad, Sr. and refusing Conway the right to examine the former Probate Officer of First Trust on fees which consitute ten financial penalties against Conway because she exercised her right as a beneficiary to due process of law and equal protection of the Probate Statutes of the North Dakota Century Code and the North Dakota Constitution?

As a matter of law, did the North Dakota Supreme Court err in awarding, in violation of the Probate Statutes of the North Dakota Century Code, a total of $280,104.97 in attorney fees plus ten

financial penalties and double costs, a $2,500.00 Reserve Retainer from the debt-free, bankrupt Estate of Guy Kjorvestad, Sr. when there has never been a distribution to his beneficiary, there has never been a single accounting in 15½ years and there is no record of the disappearance of $665,000.00 in cash assets from the Nelson County Probate Court?

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OPINIONS BELOW

The Judgment with Amended Opinion of the North Dakota Supreme Court, whose judgment is sought to be reviewed, is reprinted in the Appendix. The Judgment evolved from Judgment of the North Dakota Supreme Court entered on October 1, 1985. It encompasses three amended orders in the Nelson County Probate Court of the Judgment entered October 1, 1985. The amended orders of the Nelson County Probate Court, opinions and judgments of the North Dakota Supreme Court are reprinted in the Appendix.

To The Honorables, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Eileen Conway, respectfully requests a Writ of Certiorari to review Judgment of the North Dakota Supreme Court entered May 16, 1988 with Amended Opinion entered June 28, 1988. The North Dakota Supreme Court entered Order Denying Petition for Rehearing on June 28, 1988.

JURISDICTION

The Eighth and Fourteenth Amendments of the Constitution of the United States confers jurisdiction on the United States Supreme Court to review the Judgment of the North Dakota Supreme Court.

The North Dakota Supreme Court violated the right of Conway for protection under the Eighth Amendment from "execessive fines imposed, nor cruel and unusual punishments inflicted" because she exercised her right of due process of law and equal protection of the Probate Statutes of the North Dakota Century Code and the North Dakota Constitution.

The due-process clause of the Fourteenth Amendment ensures impartial judges. The Constitution gives the United States Supreme Court the power and the duty to keep the North Dakota Supreme Court from undermining the rule of law. In an affront to constitutional law, the North

Dakota Supreme Court ignored the Eighth and Fourteenth Amendment of the Constitution; rejected the Constitution of North Dakota; repealed the Probate Statutes of the North Dakota Century Code; refused to acknowledge the Transition Provision of the Uniform Probate Code; threw out their own North Dakota Court Rules; and disregarded common law in order to cover-up probate fraud and felonies committed by a former North Dakota Supreme Court Justice, Johnson, attorney for First Trust.

The petitioner requests stay or proceedings in the North Dakota Supreme Court and the Nelson County Probate Court pending the decision of this Court.

STATEMENT OF THE CASE

A. Proceedings and Disposition Below.

This is a Petition for Writ of Certiorari arising out of petitioners's appeal of Findings of Fact, Conclusions of Law and Order entered October 2, 1984 in the Nelson County Probate Court in Lakota, North Dakota. During oral argument before the North Dakota Supreme Court, the attorney for First Trust, Johnson, demanded that his former associate justices on North Dakota's highest court impose penalties against the petitioner, the beneficiary of the Estate of Guy Kjorvestad, Sr., for exercising her right under NDCC 30-20-13 to contest Findings of Fact, Conclusions of Law and Order.

1. Findings of Fact, Conclusions of Law and Order entered October 2, 1984.

When First Trust petitioned for a hearing on the final account of the Estate of Guy Kjorvestad, Sr. it submitted

two fraudulent documents: (a) a secret counterfeit court order which approved an interim account of the Estate of Guy Kjorvestad, Sr. and the Estate of Selma Kjorvestad, combined; and (b) final account.

(a) The secret, counterfeit court order procured by fraud on December 8, 1982.

Three weeks before North Dakota law changed on January 1, 1983 to require judges to have a law degree, First Trust petitioned for a hearing on an interim account before Judge Arnold Johnson, a full-time farmer and part-time judge, with a high school education, in Steele County, Finely, North Dakota. (Judge Johnson was substituted after Nelson County Probate Judge, Clerk of Court and Register of Deeds, Audrey Swanke, officially acknowledged two incidents of assault and battery against Conway in the Nelson County courtroom during a hearing when Conway pleaded for an accounting of

$665,000.00 in cash assets in her father's estate. After her ten minute violent rampage the six foot Judge Swanke forced Conway to sign deeds to 3520 acres of farmland. Judge Swanke formally withdrew as Probate Judge for the Estate of Guy Kjorvestad, Sr. and the Estate of Selma Kjorvestad in letters in the probate files. However, Judge Swanke illegally continued to sign secret court orders allowing criminals to ziphon cash assets out of bank accounts belonging to the estates. (Brief of Appellant, #870110, p. 15; Petition for Rehearing, #870111, p. 1 to 8)

First Trust and Johnson did not appear for their own hearing scheduled for 10 A.M. and claimed they had forgotten that they petitioned for a hearing. When they appeared in dishevelment at 12:30 P.M., Conway cited errors, omissions, discrepancies, false statements and listed $882,740.53 in missing cash assets. Fir-

st Trust aborted the hearing, withdrew their accounting and left the courtroom after the thirty minute hearing. Twenty-two months later it was discovered that Johnson and Anderson returned to Finely the next day and procured the signature of Judge Johnson on a court order which approved the interim account they had withdrawn the day before. First Trust deprived Conway of Notice and kept the court order secret for 22 months. On December 8, 1983, Anderson, in sworn testimony, denied that First Trust had secured a court order approving the interim account. (App. #870110, p. 30)(Brief of Appellant, #870110, p.12)

At the onset of the hearing on the final account on September 21, 1984, the judge announced: (App, #870110, p. 53)

> "Should it become necessary for the Court to rule on objections, because you have exceeded the scope of the hearing that we have set up, I invite Mr. Johnson to make those objections timely and I will rule on them as we go ahead." (emphasis supplied)

The counterfeit court order foreclosed Conway from inheriting $882,740.53.

(b) Final account of the Estate of Guy Kjorvestad, Sr. and the Estate of Selma Kjorvestad, combined.

Prior to the hearing, Conway exercised her rights under NDCC 30-20-13, 30-20-15, 30-20-01, 30-20-02, 30-20-07, 30-20-14, 30-20-09, 30-20-05, 30-12-09 (1) to file petition for accounting of $665,000.00 in cash assets in the Estate of Guy Kjorvestad, Sr.; (2) to contest the counterfeit court order and file written objections to it; (3) to file a written protest formally contesting the final account; (4) to file a petition pleading to the court to reject the final account; and (5) to file Objections to Allowance of Account. Durthe hearing, Conway formally petitioned the Court for an accounting of the Estate of Guy Kjorvestad, Sr.

Probate Officer, Anderson, committed

perjury 7 times when examined on her own accounting and when examined on separate accounts and securities, practiced evasion 24 times, whispering, "I don't know" or "I don't remember". Anderson confessed in sworn testimony that neither First Trust nor Anderson had ever inspected the Probate File, never read the Will, never collected his property, never preserved his property, and never accounted for his property. (Brief of Appellant, #870110, p. 16 to 23) Johnson negotiated with the Judge to change the Will of Guy Kjorvestad, Sr., and alter the distribution in order to cover-up theft of the contents of 4 safe deposit boxes belonging to his estate. Johnson claimed that embezzlements from the estate had been paid to Conway as an "Executor's Commission" and compounded his fraud by deducting the embezzlements as an "Administratrative Expense" on fraudulent estate tax returns. (App. #870110, p. 126)

Conway appealed the Order to the North Dakota Supreme Court. In Opinion and Judgment entered October 1, 1985, the North Dakota Supreme Court ruled: (App. p. 42)

> "We find no procedure from the old Probate Code which should be applicable in this decade to First Trust 'in the interest of justice.'
> Nor, do we find any procedure in the new Probate Code which is infeasible of application to these estates."
>
> "Conway points out that Kjorvestad I, 250 N.W. 2d at 276, approved application of old Probate Code procedures to these dispute in 1977. In that decision, this court said: "Application of former law was in the discretion of the trial court and we do not find an abuse of that discretion..." This prior discretionary application of old procedures did not fix procedural rights for the eternity of these estates. It is axiomatic that procedural modes, as distinguished from substantive rights, are not vested and are subject to repeal, modification or change. (App. p. 41 to 43)
>
> "First Trust suggest that we consider assessing its costs and attorneys fees on this appeal against Conway's share of the estates as an appropriate method for dealing with her unrestrained and unsubstantiated accusations. We agree." (App. p. 48)

> "Accordingly, we exercise our powers under Rule 38, R.D.R.App.P., and direct an award accordingly. We order that First Trust be paid its reasonable compensation, attorney's fees and costs on this appeal out of Conway's share of the estate only, rather than from the total estate as has been done heretofore." (App. p. 49)

The North Dakota Supreme Court remanded the case back to the Nelson County Probate Court to levy financial penalties against Conway for exercising her right of due process of law and equal protection of the laws.

2. Amended Findings of Fact, Conclusions of Law and Order Upon Remand.

Again, Johnson, the former North Dakota Supreme Court Justice, used the Nelson County Underground Probate Court because (1) Anderson had been fired by First Trust for her condition in Nelson County Probate Court for the hearing on the final account on September 21, 1984 (Brief of Appellant, #870110, p. 9) and (2) to evade examination of their billings for the period beginning September 1, 1984 which included charges for preparing the fraudulent final account and counterfeit court order (App, #870110, p. 143 to 152) To avoid examination of probate fraud, perjury and felonies, Johnson and First Trust, in violation of NDCC 30-20-15, deprived Conway of Notice and the right to defend herself against financial penalties in a court of law.

Again, Johnson used his position as a former North Dakota Supreme Court Just-

ice to subvert Judge Dosch and convert the Nelson County Probate Court into a racketeering enterprise operated for the private profit of First Trust and Johnson. Johnson coerced Judge Dosch to amend the entire Opinion and Judgment of the North Dakota Supreme Court entered October 1, 1985, and levied two financial penalties, $2,306.53 and $4,433.36, a total of $6,739.88 against Conway for exercising her right of due process of law and equal protection of the North Dakota Century Code but denied Conway the right to defend herself in a court of law.

The former North Dakota Supeme Court Justice documented "findings of fact" during the underground hearing in the Nelson County Underground Probate Court, under Supervised Administration, based on the testimony of the ghost of Conway and other phantom witnesses, fictitious exhibits, imaginary affidavits, an apparitional

court reporter, specteral beneficiaries, in an unidentified city, at an undisclosed location, on an unrevealed date, at an unspecified time, in The Golden Age of Judicial Corruption. First Trust and Johnson postponed mailing the counterfeit court order to Conway until after the time had expired for her to file a Motion.

Conway appealed the counterfeit court order to the North Dakota Supreme Court. In brief and oral argument, Johnson contended that Guy Kjorvestad's beneficiary (1) had no right whatsoever to Notice to secret court orders; (App. #870110, p. 168) (2) no right whatsoever to Notice of secret hearings; (App. #870110, p. 138) and (3) no right whatsoever to an accounting of her father's estate. (App. #870110, p. 138) The former North Dakota Supreme Court Justice explained his rationale in depriving Conway of Notice; "My thought process was

that it was a practical matter!" (Tr. Oral Argument, September 24, 1986)

In order to cover-up probate fraud and grave judicial procedural errors, the North Dakota Supreme Court changed "Amended Findings of Fact, Conclusions of Law and Order Upon Remand" entered December 5, 1985 in the Nelson County Probate Court to "Amended Order Upon Remand" and ruled:

> "Because this Amended Order Upon Remand was entered without notice or hearing, it is not appealable and we dismiss the appeal."

In its Opinion and Judgment entered on May 16, 1988 and Amended Opinion of June 28, 1988, the North Dakota Supreme Court imposed penalty # 3, $2,751.86 and penalty #4,329.00, a total of $6,086.86 for exercising her right of due process of law because Conway appealed First Trust's counterfeit court order and denied Conway of the right to defend herself in a court or law. The North Dakota Supreme Court

exceeded its juridiction, violated the due process rights of Conway and her right of protection from "excessive fines imposed, nor cruel and unusual punishments inflicted" and encouraged the Nelson County Probate Court to exceed its jurisdiction and to violate Conway's rights under the Fourteenth and Eighth Amendment when it ruled:

> "To avoid perpetuation of this dilemma, we suggest that the county court make <u>any</u> award therefore at the hearing, when and if it is held." (emphasis supplied) (App. p. 71)

The North Dakota Supreme Court falsely stated: (App. p. 68)

> "Conway appealed on February 1, 1986, arguing that she was deprived of a hearing on the reasonableness of the amounts compensation and attorney's fees."

Conway appealed because her rights under the Fourteenth and Eighth Amendment were violated.

3. <u>Findings and Order Approving Fees</u>

Entered February 23, 1987 in the Nelson County Probate Court.

First Trust demanded that the Nelson County Probate Judge levy ten financial penalties, six of unlimited and undisclosed amounts for future fees to Anderson (who had been fired over 3 years ago) and Johnson without prior authorization from any North Dakota Court, against Conway because her appeals of fraudulent accounts and counterfeit court orders procured by fraud in the Nelson County Underground Probate Court were "frivolous, flagrantly groundless and taken in bad faith". During the hearing, the Nelson County Probate Judge denied Conway a fair trial and deprived Conway of the right to examine the former Probate Officer of First Trust on charges which constituted ten financial penalties against Conway:

Supreme Court Penalty #1 Against Conway. Penalty of $2,306.53 was levied for contesting final account and counterfeit

court order in which $665,000.00 disappeared without a single accounting in 15½ years from her father's estate. The penalty represents the amount of "featherbedding fees" of Anderson while she was employed as a Hostess of First Bank after she was fired from First Trust.

Supreme Court Penalty #2 Against Conway. The $4,433.36 penalty represents charges of Johnson for preparing fraudulent final account and counterfeit court orders.

Supreme Court Penalty #3 Against Conway. A double-penalty, $2,206.53 and $2,751.86 against the beneficiary for her appeal of "Amended Findings of Fact, Conclusions of Law and Order Upon Remand, procured by fraud in the Nelson County Underground Probate Court. The two penalties represent the featherbedding fees of Anderson while employed as Hostess of First Bank.

Supreme Court Penalty #4 Against Conway.

The double-penalty, $4,433.36 and $4,329.00 represents charges of Johnson for preparation of fraudulent final account and counterfeit court orders procured by fraud in the Nelson County Underground Court.

Supreme Court Penalty #5 Against Conway. Approval in advance without prior authorization of a North Dakota court, for a financial penalty of undisclosed and unlimited amounts against the beneficiary for the future fees of Johnson but deprived Conway of the right to defend herself in a court of law.

Supreme Court Penalty #6 Against Conway. The Court order in advance, without prior authorization of a State Court, a financial penalty of undisclosed and unlimited amounts for featherbedding fees of the Hostess of First Bank since her last bill but deprived the beneficiary

of the right to defend herself in a court of law.

Supreme Court Penalty #7 Against Conway. The Court ordered in advance, without prior authorization from any State Court, a financial penalty of unlimited and undisclosed amounts against the beneficiary for future fees of Johnson but deprived Conway of the right to defend herself in a court of law.

Supreme Court Penalty #8 Against Conway. The Court ordered in advance, without prior authorization from any State Court, a financial penalty of unlimited and undisclosed amounts against the beneficiary for future featherbedding fees of the Hostess of First Bank but deprived Conway of the right to defend herself in a court of law.

Supreme Court Penalty #9 Against Conway. In violation of their own North Dakota

Rules of Disciplinary Procedure, Rule 22, and ABA Standards for Lawyer Discipline and Disability Procedures, Section 8.3, the Court ordered an unlimited and undisclosed financial penalty against the beneficiary for filing a complaint against Johnson with the Disciplinary Board of the Supreme Court. (First Trust Petition for Rehearing)

Supreme Court Penalty #10 Against Conway. The Court ordered in advance, without prior authorization of a North Dakota court, a financial penalty of unlimited and undisclosed amounts against the beneficiary for any future complaint she may file against Johnson but deprived Conway of the right to defend herself in a court of law.

Petitioner appealed the order to the North Dakota Supreme Court. In Opinion and Judgment entered May 16, 1988, the North Dakota Supreme Court affirmed in

part and reversed in part the Order of the Nelson County Probate Court. The North Dakota Supreme Court reversed Penalty #9 and Penalty #10.

Petitioner filed Petition for Rehearing on May 23, 1988. First Trust filed Petition for Rehearing for additional billings and included copies of confidential complaints filed by Conway against Johnson.

The North Dakota Supreme Court entered Order Denying Petition for Rehearing to petitioner on June 28, 1988.

4. Amended Opinion of the North Dakota Supreme Court entered June 28, 1988.

The North Dakota Supreme Court reversed their Opinion and Judgment entered May 16, 1988. After reading the confidential complaints filed against Johnson by the beneficiary, the North Dakota Supreme Court reinstated Penalty #9 and added another Penalty #10 against the ben-

ificiary for double costs and additional fees for their former associate justice but deprived petitioner of the right to defend herself in a court of law.

B. Manner of Raising Federal Questions of Fourteenth Amendment in Nelson County Probate Court.

Petitioner pleaded for the right of due process of law and equal protection of the laws during the hearing in Nelson County Probate Court on February 1, 1987 (Case No. 3168, Tr. p. 17, line 11; p. 18, line 24; p. 34, line 9; p. 35, line 19. 21; p. 44, line 2; p. 51, line 1, 8, 16; p. 52, line 16; p. 53, line 4; p. 55, line 9; p. 57, line 1, 20; p. 58, line 7; p. 59, line 4)

C. Way in Which Federal Questions Were Passed Upon by Nelson County Probate Court.

1. The judge threatened to terminate the hearing 17 times if Conway attempted

to examine First Trust on charges for probate services rendered on Exhibits #1 to #4, the basis for the ten financial penalties against the petitioner: (Tr. p. 17, line 7, 21; p. 18, line 22; p. 19, line 6; p. 28, line 11; p. 29, line 7; p. 32, line 20; p. 33, line 13; p. 38, line 25; p. 39, line 22; p. 41, line 23; p. 42, line 12, 23; p. 43, line 15; p. 44, line 20; p. 51, line 23)

2. The judge forced petitioner to give up her examination after Anderson refused to answer 47 times, Johnson objected to the examination of charges 44 times, and the judge sustained Anderson's refusal to answer and Johnson's objections 42 times.:

1. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 12, line 4)

2. Anderson refused to answer.
(Tr. p. 13, line 10)

3. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 16, line 15)

4. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 17, line 18)

5. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 17, line 22)

6. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 17, line 25)

7. Anderson refused to answer. Johnson objected. Judge sustained.(Tr. p. 18, line 3)

8. Anderson refused to asnwer. Johnson objected. Judge sustained.(Tr. p. 18, line 7)

9. Anderson refused to answer. Johnson objected. Judge sustained.(Tr. p. 18, line 10)

10. Anderson refused to anwer. Johnson objected. Judge Sustained.(Tr. p. 18, line 14)

11. Anderson refused to answer. Johnson objected. Judge sustained.(Tr. p. 18, line 17)

12. Anderson refused to answer. Johnson objected. Judge sustained.(Tr. p. 18, line 20)

13. Anderson refused to answer. Johnson objected. Judge sustained.(Tr. p. 21, line 3)

14. Anderson refused to answer. Johnson objected. (Tr. p. 25, line 17)

15. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 25, line 23)

16. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 25, line 1)

17. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p 26, line 25)

18. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 27, line 4)

19. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 27, line 6)

20. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 27, line 15)

21. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 28, line 20)

22. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 28, line 23)

23. Anderson refused to answer. Johnson objected. Judge sustained.(Tr. p. 24, line 22)

24. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p.35, line 23)

25. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 36, line 6)

26. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 37, line 2)

27. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 37, line 10)

28. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 38, line 23)

29. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 39, line 25)

30. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 40, line 3)

31. Anderson refused to answer.
(Tr. p. 40, line 7)

32. Anderson refused to answer. Johnson objected. Judge sustained.(Tr. p. 40, line 18)

33. Anderson refused to answer. Johnson objected. Judge sustained.(Tr. p. 41, line 2)

34. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 41, line 24)

35. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 42, line 6)

36. Anderson refused to answer. Johns objected. Judge sustained.(Tr.p. 42, line 22)

37. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 43, line 1)

38. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 43, line 20)

39. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 46, line 13)

40. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 46, line 23)

41. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 47, line 10)

42. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 48, line 16)

43. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 50, line 6)

44. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 50, line 9)

45. Judge blocked answer.(Tr. p. 50, line 9)

46. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p.54, line 16)

47. Anderson refused to answer. Johnson objected. Judge sustained.(Tr.p. 54, line 16)

Johnson claimed that Anderson's refusal to answer 47 times, Johnson's objections 44 times and the judges sustainments 42 times was "direct personal testimoney as to services performed and the reasonableness of the fees for those services and I submit that is more than sufficent." (File No. 3168, Tr. p. 54, line 25; p. 72, line 20)

In Findings and Order Approving Fees, entered February 23, 1988, Judge Jonal Uglem ruled, "The testimony of Pamela Anderson as an employee of First Trust Company of North Dakota familiar with the instant estates as well as experiences in administration of other estates is accurate and trustworthy." (Case No. 3168, App. p. 77)

3. In violation of the North Dakota Constitution, Article XI, Section 5 and Section 6, and Rule 30 of the N. D. Rules of Appellate Procedure, Judge Jonal Uglem and Clerk of Court Audrey Swanke sealed the Docket File of the Estate of Guy Kjorvestad, Sr. to cover-up the disappearance of $665,000.00 in cash assets from the Nelson County Probate Court without a single accounting in 15½ years. (App. p. 99 to 127) The penalties for tampering with public records against Judge Jonal Uglem, Clerk of Court Audrey Swanke and Deputy Clerk of Court Susan Pederson are provided ed in NDCC 12.1-11-05 and 44-04-18.

4. Judge Jonal Uglem and Clerk of Court Audrey Swanke reject Conway's Petition to Inspect Probate File, Including Docket File of the Estate of Guy Kjorvestad, Sr.

D. Manner of Raising Federal Questions of Fourteenth Amendment in North Dakota Supreme Court.

Brief of Appellant, #870110

Issues: II, III, V.

Statement of the Case: p. 2, line 1, 29; p. 3, line 1, 28; p. 7, line 16; p. 11, line 33; p. 26, line 24, 35; p. 27, line 9, 21; p. 28, line 36; p. 29, line 23; p. 30, line 1, 7; p. 34. line 35; p. 35, line 36; p. 36, line 1, 10, 13; p. 37, line 6; p. 38, line 2, 16, 23; p. 39, line 17; p. 40, line 38; p. 42, line 19, 23; p. 43, line 3; p. 45, line 23; p. 47, line 33; p. 48, line 1, 25, 34; p. 50, line 20.

Reply Brief of Appellant #870110: p. 1, line 1; p. 2, line 7; p. 4, line 21; p. 5, line 16; p. 6, line 16; p. 7, line 11, 18; p. 8, line 34; p. 9, line 16; p. 10, line 9, 27, 36.

Petition for Rehearing, #870110: p. 1 to 8; App. p. 1 to 4.

E. Manner of Raising Federal Question of Eighth Amendment in the North Dakota Supreme Court:

Brief of Appellant, #870110:

Issues: II, III, IV, V, and VI.

Statement of the Case: p. 2, line 1, 24; p. 3, line 1, 18, 22, 25, 28; p. 4, line 32; p. 7, line 16, 32; p. 8, line 1; p. 26, line 1; p. 27, line 4, 9, 21; p. 28, line 33; p. 29, line 1, 23, 35; p. 30, line 1, 10; p. 36, line 1, 10, 13; p. 37, line 6, 18, 23, 30; p. 38, line 2, 16, 23, 28, 32; p. 40, line 38; p. 41, line 1; p.42 line 13; p. 43, line 3; p. 45, line 2; p. 47, line 36; p. 48, line 1, 25, 33; p. 49, line 1, 15; p. 50, line 12.

Reply Brief of Appellant, #870110:

p. 1, line 1; p. 2, line 7; p. 4, line 9; p. 5, line 16; p. 7, line 11, 18, 27, 36; p. 8, line 1, 8, 17, 22, 27,

33; p. 9, line 1 6; p. 10, line 9, 16, 271

F. Way in Which the North Dakota Supreme Court Passed on Federal Questions:

In Opinion entered on May 16, 1988, the North Dakota Supreme Court ruled:

> "An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which could be seen as evidence of bad faith." "We deem this appeal to be frivolous under Rule 38, R.D.R.App.P."

The Court affirmed eight financial penalties against Conway but reversed Penalty #9 and Penalty #10. However, the Court added another financial penalty at the request of their former associate justice, Johnson, but deprived petitioner of the right to defend herself in a court or law.

In Amended Opinion entered June 28, 1988, The Supreme Court reversed their Opinion and Judgment entered on May 16, 1988. In violation of its own North Dak-

ota Rules of Disciplinary Procedure, Rule 22 and ABA Standards of Lawyer Discipline and Disability proceedings, Section 8.3, the Court reinstated Penalty #9 against petitioner for filing a complaint against Johnson with the Disciplinary Board of the Supreme Court.

The North Dakota Supreme Court rejected Conway's petition to unseal and open the Docket File and public records in the Nelson County Probate Court.

ARGUMENT

Guy Kjorvestad, Sr., a farmer, died on January 27, 1973. The Will of Guy Kjorvestad, Sr. is probated under the Probate Statutes of the North Dakota Century Code. The North Dakota State Legislature extended the protection of the Probate Statutes of the North Dakota Century Code under NDCC Article VII, 30.1-35 of the Uniform Probate Code. (App. p. 130)

In a letter regarding the tax consequences of deaths prior to July 1, 1975, the Office of the North Dakota Tax Commission required that the estates of decedents who passed away prior to July 1, 1975 must be probated under the North Dakota Code that was in force on the date of death. (App. p. 97, 130)

1. The North Dakota Supreme Court exceeded its jurisdiction when it "repealed in the interest of justice" the Probate Statutes of the North Dakota Century

Code and Article VII, 30.1-35-01 (8-101) Subsection 1 and 2(a) passed by the North Dakota State Legislature to protect the estates of farmers.

2. The North Dakota Supreme Court violated Conway's right of due process of law and equal protection of the Probate Statutes of the North Dakota Century Code when it "repealed in the interest of justice" the Probate Statutes and instead applied the Uniform Probate Code which was not adopted until July 1, 1975, almost two and a half years after the date of death of Guy Kjorvestad, Sr., January 27, 1973.

> "We find no procedure from the old Probate Code which should be applicable in this decade to First Trust 'in the interest of justice'."

> "Conway points out that Kjorvestad I, 250 N.W. 2d at 276, approved application of the old Probate Code procedures to those disputes in 1977. In that decision this Court said:
> 'Application of former law was in the discretion of the trial court and we do not find an abuse of that discretion.'

> This prior discretionary application of old procedures did not fix procedural rights for the eternity of those estates. It is axiomatic that procedural rights, are not vestaed and are subject to repeal, modifiation or change." (App. p. 41 to 43) (emphasis supplied)

3. The rulings of the North Dakota Supreme Court are unjust, capricious, fraudulent, exceeds its jurisdiction and encourages the Nelson County Probate Court (1) to exceed its jurisdiction; and (2) to violate the constitutional rights of Conway under the Fourteenth and Eighth Amendment. In its decision on Amended Findings of Fact, Conclusions of Law and Order Upon Remand, procured by fraud in the Nelson County Underground Probate Court, under Supervised Administration, The North Dakota Supreme Court ruled in Opinion and Judgment entered October 28, 1986:

> "To avoid perpetuation of this dilemma, we suggest that the county court make any award therefor at the hearing when and if it is held. (App. p. 71)

4. In violation of the North Dakota Constitution, Article VI, Section 5 and Section 6, the North Dakota Supreme Court denied Conway access to the Docket File of the Estate of Guy Kjorvestad, Sr. (App. p. 99 to 127) The North Dakota constitutional provision was upheld in State v. First State Bank, 52 N.D. 231, 202 N.W. 391. The penalties against Judge Jonal Uglem, Clerk of Court Audrey Swanke and Deputy Clerk of Court Sustan Pederson are provided in NDCC 12.1-11-05 and 44-04-18.

5. The rulings of the North Dakota Supreme Court are in direct conflict with previous decisions in the North Dakota Supreme Court and even contradict previous decisions in these estates.

The rulings of the North Dakota Supreme Court violates the fundamental principle that one shall have notice of any judicial proceeding affecting one's rights. Deprivation of Notice affected the substantial rights of Conway and resulted in the forfeiture or divestiture of her right to inherit $882,740.53. Deprivation of notice foreclosed Conway from defending herself against financial penalties imposed by the North Dakota Supreme Court.

The North Dakota Supreme Court held in Crowl v. Wentz, 107 N.W. 2d 697, 700 (N.D. 1961):

> "Where giving of notice is relied on to sustain forfeiture or divestiture of one's rights, statutory direction as to how such notice shall be given must be strictly complied."

Quoting from an earlier decision in Nelson v. Ecklund, 68 N.D. 724, 288 N.W. 273, 277 (1938), the Court decided:

"No decree...so materially affecting the rights of property and person, can be valid, unless the party to be affected has had an opportunity to be heard in defense of his rights."

In Goetz v. Gunsch, 80 N.W. 2nd 548, (December 19, 1956), the North Dakota Supreme Court stated:

"Where judgment is procured by extrinsic fraud, upon discovery of fraud, or when such fraud is called to the attention of court, court has power and authority to vacate such judgment."

The North Dakota Supreme Court decided in Paul v. Paul et al, 170 N.W. 658, (February 11, 1919):

"Judgment or decree procured through extrinsic fraud practiced upon the court may thereafter at any time be vacated and set aside as wholly void."

The North Dakota Supreme Court ruled in Lewis v Poel, 136 N.W. 2 7, (July 13, 1965):

"If fiduciaries, their attorneys, and parties in interest, cooperated for personal profit in secret mismanagement of three estates at the expense of one or more of the estates and to the detriment of minor beneficiary of each estate, the beneficiary's assignee was entitled to account and other

relief for fraud."

The Court ruled in Hammond v. Weiss, 203 N.W. 2d 578:

> "Order of the probate court fraudulently obtained are not res judicate."

The North Dakota Supreme Court held in Danks v. Holland, 246 N.W. 2d 86 (September 26, 1976):

> "Where appeal was not flagrantly groundless, costs would not be assessed in favor of successful plaintiff on theory that the appeal was frivolous."

In Hoerr v. Northfield Foundry and Machine Company, 376 N.W. 2d 323 (N.D. 1985) the same Court decided:

> "An award of damages, costs, and attorney fees are not justified for an appeal which was neither frivolous or taken in bad faith."

6. The North Dakota Supreme Court abused its judicial power endowed by the State of North Dakota and breached the public trust when it made false statements in seven flawed decisions reported in the Northwestern Reporter to cover-up probate fraud.

hostage for 15½ years while they ziphoned out all the cash assets. In violation of law, Pearson for 15½ years claimed that the North Dakota Supreme Court ruled that there is no necessity to have a full accounting". (App. #870110, p. 3) (Reply Brief of Appellant, #870111, ps. 2 to 10) Conway v. Parker, 250 N.W. 2d 266 N.D. 1977; Conway v. Parker, 287 N.W. 2d 465 (N.D. 1980); Conway v. Parker, 304 N.W. 2d 83 (N.D. 1981; First Trust v. Conway, 375 N.W. 2d 160 (N.D. 1985); First Trust v. Conway, 395 N.W. 2d 162 (N.D. 1986)

In two wills written on July 8, 1969 and December 3, 1972, Guy Kjorvestad, Sr. designated his daughter, Eileen Conway, as his sole Executrix in the event that his wife predeceased him. An older daughter, Parker, who lived in his vicinity was not named in any capacity. Guy Kjorvestad's nephew and family lawyer, Idean Lockeen, was named Attorney for the Estate of

Guy Kjorvestad, Sr. Parker hired an attorney, Pearson, to push out Locken, the Attorney for the Estate of Guy Kjorvestad, Sr., remove Conway as Executrix and change the wills. Locken computed the estate tax to be $85,403.39. Pearson engaged in 3 criminal maneuvers to steal the Estate of Guy Kjorvestad, Sr.

1. Without the knowledge of Locken or Conway, Pearson illegally filed fraudulent federal and state estate tax returns in the name of Eileen Conway without her knowledge; Pearson illegaly filed fraudulent federal and state income tax returns in the name of Eileen Conway without her knowledge; and on February 3, 1978, Pearson illegally filed a lawsuit in the name of Eileen Conway against the United States of American without her knowledge in U. S. District Court based on a fraudulent estate tax return. After 15 years of litigation, all initiated by Pearson and First

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Trust, the estates were forced to pay $417,868.13 in additional taxes, additional interest, penalties and attorney fees for the fee-building adventures of Pearson and First Trust. The IRS established the correct estate tax for the Estate of Guy Kjorvestad, Sr. as $85,553.56--a difference of $150.17 from Locken's honest estate tax return--for 15 years of litigation and fraud by Pearson and First Trust. If the estates had been probated honestly by Locken, the estate would be worth $3, 253,992.40 on July 1, 1987. Instead, both estates are bankrupt.

2. Pearson destroyed all the estate records and defied two court orders to surrenders 10 large files of records.

3. Each time Conway, Executrix of her father's estate, attempted to get an accounting, Pearson countered with petitions to remove her in order to cover-up income and estate tax fraud.

Conway worked day and night for 15½ years and spent $250,000.00 of her own money trying to get an accounting of her father's estate that was required by North Dakota law. When Conway announced at a Pre-Trial Hearing that she was bringing in a Big Eight accounting firm to testify on income and estate tax fraud, a Document Examiner, formerly with the FBI, to testify on forgeries and witnesses to testify on theft, Pearson demanded that his former law partner, Judge Kirk Smith, remove Conway as Executrix on a Summary Judgment. Pearson appointed First Trust as his own Executor of the Estate of Guy Kjorvestad, Sr., First Trust. On December 8, 1982, First Trust and Johnson secured a counterfeit court order, procured by fraud, which covered eight years of probate fraud. Pearson spent 15 years trying to cover-up estate and income tax fraud and petitioned the North Dakota Supreme Court to force Conway "to give" her

Power of Attorney to a hard-core criminal, Youngern. The North Dakota Supreme Court is the only court that has taken a discretionary act, Power of Attorney, and used it as a weapon against a beneficiary to cover-up income and estate tax fraud by a renegade lawyer. 85 ALR 3rd 1108.

The United States District Court and the United States Tax Court both ruled again Pearson and First Trust. Estate of Guy Kjorvestad, Sr. v. United State of America, No. A78-2077, (March 10, 1981)

CONCLUSION

A member of the Joint Committee of Professional Discipline of the National Center of Professional Responsibility explained the futility of challenging judicial corruption in North Dakota:

> "North Dakota has been targeted as the prime problem state for judicial corruption. The North Dakota Judicial System is so corrupt that going into court there is like falling into the world of Charles Dickens. Judicial and lawyer discipline are simply non-existent! Ralph presides over a band of cut-throat thieves. When we have gone in there to clean up the corruption and raise standards we have met only hostility and resentment from the justices of the North Dakota Supreme Court."

A sub-culture of crime has grown up around the North Dakota Judicial System. The justices of North Dakota's highest court have made false statements to cover-up probate fraud and felonies of their former associate justice. Plato's dialogues in The Republic on the just and the unjust stripped of appearances are as appropriate in North Dakota in 1988

as they were in 410 B. C.

> "...for the highest reach of injustice is: to be deemed just when you are not."

Only when a major scandal loosens the grip of lawless judges and calls into question the legitimacy of the basic judicial system, as it surely does in "The-Probate-Crime-of-the-Century" in the Estate of Guy Kjorvestad, Sr., does real reform in the North Dakota Judicial System seem possible.

The petitioner prays that a Writ of Certiorari will be granted.

88-707

Supreme Court, U.S.
FILED
OCT 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO._____

EILEEN CONWAY,

Petitioner,

vs.

FRIST TRUST COMPANY,

Respondent.

APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI

Eileen Conway
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IN THE COUNTY COURT OF NELSON COUNTY

STATE OF NORTH DAKOTA

In the matter of the Estate of)
)
Guy Kjorvestad, Sr., Deceased.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Petitioner, First Trust Company of North Dakota, filed a Final Accounting and Petition for Settlement and Distribution of the Estate which came on for hearing at Nelson County Courthouse, Lakota, North Dakota, on September 21, 1984. The Petitioner appeared by Pam Anderson, its Probate Officer, and by J. Philip Johnson, its attorney, Lorraine Parker and Eileen Conway, heirs of the estate, appeared personally. Mrs. Conway filed and voiced various objections to the Petition and general status of the estate. Mrs. Parker made no objections.

Upon the testimony and exhibits presented and upon the records and files in

this estate, the Court makes the following Findings of Fact:

FINDINGS OF FACT

1. This estate has been subject to a host of legal proceedings, hearings and appeals which have substantially delayed and extended this closing and which were, with few exceptions, initiated by Mrs. Conway through a long succession of attorneys.

2. Guy Kjorvestad died testate on January 17, 1973. Petition is the duly appointed, qualified and acting Successor Personal Representative of the decedent's estate.

3. The previous Personal Representative of the estate, Eileen Conway and Lorraine Parker, were removed by Order of the District Court on June 19, 1980. The Petitioner was appointed Successor Personal Representative on September 2, 1980.

4. Pursuant to Stipulation and Order of the Court, an interim distribution of real estate and other assets constituting the bulk of the estate was made to the heirs, Eileen Conway and Lorraine Parker, on or about February 21, 1979.

5. On December 6, 1982, the Court approved a Reconstructed Report and Account for the estate for the period January 23, 1978 to September 4, 1980.

6. An Inventory and Appraisement of all property of the estate known to the Successor Personal Representative has been filed and audits conducted by the Internal Revenue Serve verifying the nature, extent and valuation of assets of the estate. Under previous Order of the Court, Eileen Conway and Lorraine Parker were directed to deliever all assets of the estate in their possession and assist with marshalling any remain-

ing assets.

7. Notice to Creditors of the decedent has been published as required by law and the time for presenting claims that arose prior to the death of the decedent has expired.

8. All debts of the decedent and of the estate, and all expenses of administration thus far incurred, except those approved by separate Order upon hearing this date, and all taxes that have attached to or accrued against the estate have been paid.

9. The Petitioner filed a Final Account detailing receipts and disbursements in the Administration of the estate from September 4, 1980, totaling receipts of $249,172.24 and disbursements of $215,020.90 and the estate is in a condition to be provisionally closed.

10. Allegations of misconduct on the part of attorneys, court officials, the

Personal Representative, and Lorraine Parker as made by Eileen Conway in documents filed with the Court are totally unsubstantiated by credible evidence. The administration of the Successor Personal Represenative has proceeded in a competent and professional manner delayed and deterred only by the objections and proceedings initiated by Eileen Conway.

11. The decedent's will was previously admitted to probate in formal proceedings following notices required by law.

12. The decedent's will directs that the property remaining after payment of debts, claims, taxes, costs and expenses be distributed in equal shares to the surviving daughters of the decedent, Eileen Conway and Lorraine Parker.

13. The Stipulation and Interim Distribution of the parties on or about February 21, 1979, contemplated certain ag-

reed adjustments in the respective distribution between the heirs.

14. The assets remaining in the estate consist of the following:

a. Money market fund in the amount of $81,897.61 as of October 30, 1984.

b. 600 shares of Otter Tail Power Company common stock;

c. Coin collection.

15. In view of the extended litigation history of this estate a reasonable reserve for additional litigation expense is appropriate.

CONCLUSION OF LAW

1. The Final Report and Account of the successor Personal Representative is approved and allowed.

2. A litigation reserve in the amount of $10,000.00 shall be retained by the Personal Representative for a period of one year from the date of entry of this

Order and such account shall be applied toward any additional expenses of the Personal Representative and its attorneys arising from claims or litigation subsequent to such date. The balance shall be distributed in equal shares to Eileen Conway and Lorraine P rker upon expiration of that period.

3. The Personal Representative shall distribute to Eileen Conway 300 share Otter Tail Company common stock; one half of coin coolection based on selection and appraisals to be determined in the discretion of the Personal Representative, and one half of the balance of the account, less $16,000.00 for difference in previously stipulated land values; less $3,000.00 for difference in value of residence transferred, plus $250.00 for difference in automobiles transferred; as per previous stipulation of the parties.

4. The Personal Representative shall distribute to Lorraine Parker 300 shares of Otter Tail Power Company common stock, one-half of coin collection based upon values and selection as determined in the discretion of the Personal Repreentatives; and one-half of the balance of the account, plus $16,000.00 for difference in land values; plus $3,000.00 for difference in residence value; less $250.00 for difference in automobile values; as per stipulation of the parties.

5. Distribution shall be deferred until expiration of the time for appeal or upon receipt of Writ and Waiver of Appeal by all interested parties.

6. The successor Personal Representative shall be discharged from all claims or demand of any interested person as matters relating to the accounting and distribution of this estate as determined by this Order.

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is involved, each proceeding before the court is independent of any other proceeding involving the same estate;..." Also compare S30.1-16-01, N.D.C.C., on the nature of proceedings in supervised administration.) Conway makes no showing that she filed a demand for notice of entry of orders, as contemplated by S30.1-13-04, N.D.C.C. In any event, that section goes on to provide: "The validity of an order which is issued or filing which is accepted without compliance with this requirements shall not be affected by the error...."

We observe that, unless contrary to or inconsistent with the Probate Code, "the rules of civil procedure, including the rules concerning vacation of orders and appellate review, govern formal proceedings under this title;" S30.1-02-04, N.D.C.C. (emphasis supplied). See Matt-

er of Estate of Bieber, 256 N.W. 2d 879 (N.D. 1977).

Rule 77(d), N.D.R.Civ.P., is the rule of civil procedure which deals with notice of entry. It says:

> "(d) Notice of Entry of Judgment Served. Within 10 days after entry of judgment in an action in which an appearance had been made, notice of such entry, together with a copy of such judgment or a general description of the nature and amount of relief and damages thereby granted, shall be served by the prevailing party upon the adverse party."

While this rule, unlike its Federal counterpart, seems to require notice of entry of only a judgment, we have defined "judgment"bradly as "a judicial determination on matters submitted to a ccurt for decision which fixes the rights and duties of the parties." Matter of Estate of Raketti, 340 N.W. 2d 894, 898 (N.D. 1983). But, we do not need to decide in this case whether Rule 77(d), N.D.R.Civ.P., requires notice of entry of an interim

order in a supervised administration. For this case, it is enough to point out that because of express provisions of other rules of civil procedure, the effects of failure to give notice of entry of any order are that it extends the time periods, both for relief from an order under Rule 60(b), N.D.R.Civ.P., and for appeal under Rule 4(a), N.D.R. App.P. The time periods of both of these perinent procedural rules are expressly tied to service of ntoice of entry or judgment involved.

The record clearly shows that Conway and her then counsel knew by December, 1983, that the order approving the Reconstructed Account was on file. Conway made no effort thereafter to seek relief from that order.

It is well established that an interlocutory order may be reviewed on appeal from the final order or judgment in

the matter. Suburban Sales v. District Court of Ramsey, 290 N.W. 2d 247, 251 (N.D. 1980); United Hospital v. Hagen, 285 N.W. 2d 586 (N.D. 1979)

We conclude that an interim order in supervised administration, pursuant to a hearing upon notice but where notice of entry is not given, stands unless duly vacated pursuant to the rules of civil procedure. Further, it is subject to appellate review as an interlocutory order, upon appeal from a final order completing settlement of the estate. See S30.1-16-05 and 30.1-21-01, N.D.C.C.[1] Thus, on this appeal of the order approving the final account and final distribution, the question is whether there was any error in the interim order approving the Reconstructed Account.

But, Conway's only showing is that she lacked notice of the order approving the Reconstructed Account. Although she

was represented by counsel at the hearing on the Reconstructed Account, there is no transcript. She took no steps to have a statement of the evidence or proceedings "from the best available means" prepared for this appeal; see Rule 10(f), N.D.R.App.P. Nor, did she make an offer of proof when the county judge limited her evidentiary presentation at the final account hearing. Thus, we have neither evidence nor record to reconsider Conway's complaints about deficiencies in the Reconstructed Account. Therefore, the record of this appeal fails to show any error in the Reconstructed Account.

We have often pointed out that this court will not review claimed errors where there is no record and no offer of proof by which the claim of error can be properly evaluated. Cargill, Inc.

v. Davanaugh, 238 N.W. 2d 133 (N.D. 1975); Jore v. Saturday Night Club, Inc., 277 N.W. 2d 889 (N.D. 1975); See Rule 103(A), N.D.R.Ev.: "Error may not be predicated upon a ruling which...excludes evidence unless a substantial right of the party is affect, and...the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." (emphasis supplied).

We have studied the transcript of the hearing on the final account to consider whether the substance of evidence excluded was apparent from the context and to assess whether any substantial right of Conway was affected by the exclsuion of evidence at that hearing. The substance of evidence excluded is not apparent from the context, as no offer of proof was made, we find no error. Halverscn v. Pet, Inc., 261

N.S. 2d 887, 894 (N.D. 1978)

For example, Conway asserted in her cross-examination that "there is still grain in the elevator belonging to Guy Kjorvestad," implying that the Reconstructed Account is erroneous for omitting grain. No specific elevator or warehouse receipts were identified. The Reconstructed Account by First Trust recited that its investigation indicated "grain was distributed to the heirs" prior to the appointment of First Trust and concluded, "[n[o grain on hand belonging to the estate." The record shows that on July 13, 1978, (which was after division and distribution of the farm land), the county court ordered that "[t]he grain presently on hand owned by the estates...shall be distributed in equal shares to the heirs, Eileen Conway and Lorraine Parker. The mechanics of distribution shall be that all grain presently

held by the estates shall be delivered to the elevators 50 per cent in the name of each heir, with documents of title being delivered by the respective elevators for each heirs"share." Thus, the insinuations Conway makes about grain on hand are contrary to the record. She may not have availed herself to an existing order of distribution of grain, but if she has not, that is not a responsibility of First Trust nor a deficiency in its Reconstructed Account. Furthermore, Conway did not acccunt for any grain on hand at the time she was removed. This contention plainly lacks substance.

As another example, Conway maintains that the Reconstructed Account fails to show all the coins and items originally inventoried in safe deposit boxes. What First Trust is expected to do about missing items is not spelled out. Conway offered no evidence as to

the present whereabouts of any missing items. This lack of proof and her own failure to acccunt demonstrate that her effort to place respcnsibility on First Trust to further account for a pericd prior to its appointment is without merit.

The County Court's order approving the Reconstructed Account determined that neither Parker or Conway" have complied with the Judgment of the District Court, dated June 19, 1980, directing either of [sic] both of them to file a complete report and account as to the assets" of the Kjcrvestad estates. Conway does not dispute this. She cannot complain about First Trust's reconstructed accounting when she had the primary duty but ignored it.

Absent credible evidence tc consider the conjectures Conway makes, we conclude that no error has been shown in the order

allowing the Reconstructed Account. We also conclude that there was no error in the county court's discretionary ruling excluding evidence about the Reconstructed Account at the hearing on final account.

II. COLLECTION OF ASSETS

Conway repeats similar complaints about missing assets by insisting that First Trust had "a duty to fully investigate and determine if any assets were not accounted for, and alos negate the possibility that fraud was committed." She also makes various vague claims as to missing funds, ranging from $39,000 to $882,740, but there is no coherent identification of where or when these funds allegedly disappeared. Conway castigates First Trust for not doing enough to collect these assets which she believes are missing. She points out that a successor Personal Representative "has the same power and duty as

as the original personal representative complete the administration and distribution of the estate as expeditiously as possible...N.D.C.C. S30.1-18-16.

Conway cites Miller v. First National Bank of Linton, 62 N.D. 122, 242 N.W 124 (1928) and Dolphin v. Peterson, 63 N.D. 792, 249 N.W. 784 (1933) to the effect that an executor of an estate has a duty to account for all property belonging to the estate. She also cites several cases from other states which imply that successor fiduciaries must account "for the entire period of time in question rather than simply just after their appointment." Those may sound general principles, but have no application to the circumstances of this case.

Our Probate Code specifically provides:

> "Except as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated." N.D.C.C.S30.1-17-13 (emphasis supplied).

First Trust's duties were appropriately otherwise ordered as to responsibility for prior actions of Parker and Conway.

"The duties and pwoers of a personal representative commence upon his appointment." N.D.C.C. S30.1-18-01. When appointed, First Trust was expressly absolved of any and all liability for any actions, transactions, errors or omissions of...Parker and...Conway...prior to the date of its appointment..." This order was congruent with the Probate Code which allows a personal representative to leave property with those who are "presumptively entitled thereto unless necessary for purposes of administration; N.D.C.C. S30.1-18-09.

Prior filed accountings and prior

distribution to the sisters demonstrate that First Trust was not obligated to collect all assets of the estates. Its responsibility extended only to remaining property of the estates that actually came into its hands. We perceive no basis to impose fiduciary responsiblity on First Trust for assets that were never turned over to it by Conway or Parker.

Conway argues that it is sufficient to impose a greater fiduciary duty on First Trust that it "had been alerted that asserts [sic] may be missing...and that there may have been wrongdoing on the part of a previous coexecutrix." Mere possibility of misconduct by a prior fiduciary is not alone sufficient reason to hold a successor fiduciary responsible for it.

The record is barren of evidence showing that present whereabout or custody of and specific missing assets.

Conway herself wholly failed to account for any. Under the circumstances we conclude that First Trust did not have any fiduciary duty to Conway in collecting assets of the estates.

III. PERFORMANCE OF DUTIES

Conway insists that First Trust failed to perform its statutory duties because no complete inventory and appraisal in her mother's estate was ever made, and no notice to creditors was ever given in that estate. In doing so, she insists that procedural provisions about inventory, appraisal and notice to creditors of the old Probate Code in effect when her mother died in 1974 should apply.

Our current Probate Code was adopted from the Uniform Probate Code in 1973, effective July 1, 1975. N.D.C.C. S30.1-35-01(1). It specifically provided:

> "b. The title applies to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except

> to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this title." N.D.C.C. S30.1-35-01(2)

The old Probate Code, chapters 30-13, 30-15, and 30-20, was simultaneously repealed. 1973 S.L., ch. 257, S82.

We find no procedure from the old Probate Code which should be applicable in this decade to First Trust "in the interest of justice." Nor, do we find any procedure in the new Probate Code which is infeasible of application to these estates.

Conway points out that Kjorvestad I, 250 N.W. 2d at 276, approved application of old Probate Code procedures to those disputes in 1977. In that decision this Court said: "Application of former law was in the discretion of the trial court and we do not find an abuse of that discretion...." This prior discretionary

application of old procedures did not fix procedural rights for the eternity of these estates. It is axiomatic that procedural modes, as distringuished from substantive rights, are not vested and are subject to repeal, modification or change. Kessler v. Thompson, 75 N.W. 2d 172, 178 (N.D. 1956).

The lack of formal inventory and appraisement in this disrupted estate is not significant in view of the extensive tax filings and litigation, which First Trust concluded, and in view of the prior major distributions in these estates before First Trust was appointed to wind them up. Nothing supports imposing a greater burden upon First Trust than upon Conway herself. Again, her own failure to cause inventory and appraisal while she was responsible, as well as her own failure to account to her successor, demonstrates the

the lack of merit in her claim that First Trust failed to perform statutory duties.

As to Conway's complaint that notice to creditors had not been given in her mother's estate, we observe that this saved needless expense to the estate since all creditors' claims against the estate were long since barred by the lapse of time in this estate. N.D.C.C S30.1-19-03.

We hold that First Trust satisfactorily performed its duties of administering and distributing the remaining balance of Mrs. Kjorvestad's estate "as expeditiously as possible."

IV. ADDITIONAL COMPENSATION

Conway argues that it was "clearly erroneous" to award compensation to First Trust because total fees paid to personal representative exceed amounts authorized by the old Probate Code and be-

cause First Trust failed "to perform its statutory duties." Our consideration of these same issues earlier in this opinion dispose of these contentions.

Conway complains that administrative costs have been excessive. There is no recognition by her of her own obsessive role in this. We observe that, in addition to the direct costs to these estates of her litigation, she was reimbursed a total of $41,054.25 in expenses after her removal, when her sister waived any such claim. Thus, any excessiveness in administration costs cannot be attributed to First Trust.

First Trust insists that it has done "our best in a very difficult situation," and suggests that "some bonus...in the nature of combat pay be in order." Pointing to Conway's repeated litigation over payment of fees and expenses in past proceedings in these estates, see Kjorvestad

I, II, and Iv, First Trust correctly observes that "Conway has no obvious objection to litigation, except for payment of its cost." Indeed, Mrs. Conway has paid no heed to this court's prior warnings about dissipating funds of the estates through rancorous litigation; see Kjorvestad II, 287 N.W 2d at 468 and Kjorvestad III. 304 N.W. 2d at 87.

Without cooperation from Conway, First Trust collected remaining assets and funds (some of which had been in non-interest bearing status for many months), completed and filed amended estate tax returns, prosecuted and resolved complex estate tax litigation in the federal courts, filed fiduciary income tax returns, prepared the Reconstructed Account, and prepared and submitted its final account and petition for distribution. It appears that First Trust diligently sough to dispatch its duty to complete the

administration of both estates as "expeditiously as possible" under the circumstances.

The Probate Code authorizes reasonable compensation to a personal representative and to those properly employed to assist in administration of any estate, including reasonable attorney's fees to defend or prosecute any proceedings in good faith. N.D.C.C. S30.1-18-19, 30.1-18-21 and 30.1-18-20. The county court approved the compensation as reasonable. Under N.D.R.Civ.P., Rule 52(a) we are required to affirm the findings of the county court on compensation unless they are "clearly erroneous." No evidence was submitted by Conway to dispute the services itemized or the hourly rates charged. We conclude that the county court's approval of compensation was not erroneous.

V. COSTS OF THIS APPEAL

First Trust suggest that we consider assessing its costs and attorney's fees on this appeal against Conway's share of the estates as an appropriate method for dealing with her unrestrained and unsubstantiated accusations. We agree.

We have fully examined the record and carefully considered her issues to satisfy ourselves that there was no serious symptom in her legal hypochrondria. We found non. We conclude that her sweeeping accusations are unreasonable and that her claims of misconduct by First Trust are entirely unsubstantiated.

This public airing of her private obsession ought to be at her personal expense. As the Nebraska Supreme Court recently observed: "It seems to us that the probate code should not be construed

so as to permit one heir or devisee to finance his or her lawsuit against another heir or devisee out of the funds of the estate..." In Re Estate of Keating, 371 N.W. 2d 107, 109 (Nb. 1985).

Accordingly, we exercise our powers under Rule 38, N.D.R.App.P., and direct an award accordingly. We order that First Trust be paid its reasonable compensation, attorney's fees and costs on this appeal out of Conway's share of the estate only, rather than from the total estate as has been done heretofore.

VI. CONCLUSION

We hold that there is no evidence that the Reconstructed Account was erroneous and we hold that the county judge did not err in excluding further evidence concerning that prior period at the later hearing on the final account. We also hold that First Trust satisfactorily performed its fiduciary duties to

collect assets and account for them.

We affirm the Order Approving the Reconstructed Account, the Order Approving the Final Account and Directing Distribution, and the County Court's order approving compensation and expenses to First Trust and its attorney. We direct that First Trust be paid its reasonable compensation, attorney's fees and costs on this appeal, as determined and approved by the county court, from the remaining share of the estates distributed to Conway.

Herbert L Meschke

Vernon R. Pederse S.J

Gerald W. VandeWalle

H. F. Gierke III

Ralph J. Erickstad, C.J.

Pederson, S. J., sitting in place of Levine, J., disqualified.

[1] An interim order in supervised administration may also be reviewed upon direct appeal when there is an express determination that there is no just reason for delay and an express direction for its entry as final judgment under Rule 54(b), N.D.R.Civ.P.,: Kjorvestad IV, 345 N.W. 2d at 841-842.

File Nos. 10,866-10,867

STATE OF NORTH DAKOTA
ss
IN THE SUPREME COURT

Appeal from the (County) Court of Nelson County

IN THE MATTER OF THE ESTATE OF
GUY KJORVESTAD, SR. DECEASED, AND
IN THE MATTER OF THE ESTATE OF
SELMA KJORVESTAD, DECEASED.

First Trust Company of
North Dakota,

Petitioner and Appellee

v.

Eileen Conway,

Respondent and Appellant

This appeal having been heard by the Court at the June, 1985 term before: The Honorable Ralph J. Erickstad, Chief Justice; the Honorable Gerald W. VandeWalle, the Honorable H.F. Gierke III, the Honorable Herbert L Meschke, the Honorable Vernon R. Pederson, Surrogate Judge, Justices;

and the Court having considered the appeal, it is ordered and adjudged that the ORDERS of the court below be and the same ARE HEREBY AFFIRMED.

IT IS FURTHER ORDERED AND ADJUDGED THAT THE COSTS ON APPEAL WILL BE ASSESSED IN ACCORDANCE WITH THE OPINION FILED HEREWITH.

Dated October 1, 1985

Attest: Luella Dunn

Clerk of the Supreme Court

By the Court:

Ralph J. Erickstad

Chief Justice

North Dakota Supreme Court

IN THE COUNTY COURT OF NELSON COUNTY

STATE OF NORTH DAKOTA

In the Matter of the Estate)
)
of Guy Kjorvestad, Deceased)

AMENDED FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER UPON REMAND

The Petition, First Trust Company of North Dakota, filed a Final Accounting and Petition for Settlement and Distribtion of the Estate which cam on for hearing at the Nelson County Courthouse, Lakota, North Dakota, on September 21, 1984. The Petitioner appeared by Pam Anderson, its Probate Officer and by J. Philip Johnson, its attorney. Loraine Parker and Eileen Conway, heirs of the estate, appeared personally. Mrs. Conway filed and voiced various objections to the Petition and general status of the estate. Mrs. Parker made no objections.

Findings of Fact, Conclusions of Law

allowing the final account and approving distribution of the remainder of the estate were entered October 2, 1984. Eileen Conway appealed from that Order to the North Dakota Supreme Court which affirmed the Order, subject to instructions contained in its Opinion dated October 1, 1985. Petition for Rehearing was denied Octoboer 28, 1985.

Upon the testimony, exhibits and affidavits presented and upon the records and files of this estate, the Court makes the following Amended Findings of Fact:

FINDINGS OF FACT

1. The estate has been subject to a host of legal proceedings, hearings and appeals which have substantially delayed and extended this closing and which were, with few exceptions, initiated by Mrs. Conway through a long succession of attorneys.

2. Guy Kjorvestad died testate on January 17, 1973. Petitioner is the duly appointed, qualified and acting successor Personal Representative of the decedent's estate.

3. The previous Personal Representatives of the estate, Eileen Conway and Lorraine Parker, were removed by Order of the District Court on June 19, 1980. The Petitioner was appointed successor Personal Representative on September 4, 1980.

4. Pursuant to Stipulation and Order of the Court, an interim distribution of real estate and other assets constituting the bulk of the estate were made to the heirs, Eileen Conway and Lorraine Parker, on or about February 21, 1979.

5. On December 6, 1982, the Court approved a Reconstructed Report and Account for the estate for the period

January 23, 1978 to September 4, 1980.

6. An Inventory and Appraisement of all property of the estate known to the successor Personal Representative has been filed and audits conducted by the Internal Revenue Service verifying the nature, extent and valuation of assets of the estates. Under previous Order of the Court, Eileen Conway and Lorraine Parker were directed to deliver all assets of the estate in their possession and assist with marshalling any remaining assets.

7. Notice to Creditors of the decedent has been published as required by law and the time for presenting claims that arose prior to the death of the decedent has expired.

8. All debts of the decedent and of the estate, and all expenses of administration thus far incurred, except those approved this date, and all taxes that

have been attached to or accrued against the estate have been paid.

9. The Petitioner filed a Final Account detailing receipts and disbursements in the administration of the estate from September 4, 1980, totaling receipts of $249,172.24 and disbursements of $215,020.90 and the estate is in a condition to be closed.

10. Allegations of misconduct on the party of attorneys, court officials, the successor Personal Representative and Lorraine Parker as made by Eileen Conway in documents filed with the Court are totally unsubstantiated by credible evidence. The administration of the successor Personal Representative has proceeded in a competent and professional manner delayed and deterred only by the objections and proceedings initiated by Eileen Conway.

11. The decedent's will was previously admitted to probate in formal proceedings following notices required by law.

12. The decedent's will directs that the property remaining after payment of debts, claims, taxes, costs and expenses be distributed in equal shares to the surviving daughters of the decedent, Eileen Conway and Lorraine Parker.

13. The Stioulation and Interim Distribution of the parties on or about February 21, 1979, contemplated certain agreed adjustments in the respective distributions between the heirs.

14. The assets remaining in the estate consist of the following:

a. Money market fund in the amount of $81,897.61 as of October 30, 1984;

b. 600 shares of Otter Tail Power Company common stock;

c. Coin collection.

15. In view of the extended litigation history of this estate a reasonable reserve for additional litigation expenses is appropriate.

16. Necessary and reasonable attorney's fees based upon hourly charges, and appeal costs, were incurred by Pancratz, Yuill, Wold, Johnson & Feder, attorney's for the Personal Representative, arising from the appeal of the Orders in this and the companion estate in the amount of $4,433.36.

17. Necessary and reasonable Personal Representative's fees based upon customary charges were incurred as a result of the appeal of the Orders in this and the companion estate in the Amount of $2,306.53.

CONCLUSIONS OF LAW

1. The Final Report and Account of the successor Personal Representative is approved and allowed.

2. A litigation reserve in the amount of $2,500 shall be retained by First Trust Company of North Dakota for a period of one year from the date of entry of this Order and such account shall be applied toward any additional expenses of First Trust Company and its attorneys arising from claims or litigation relating to the estate subsequent to such date. The balance shall be distributed in equal shares to Eileen Conway and Lorraine Parker upon expiration of that period.

3. The attorneys' fees and Personal Representatives's fees and costs incurred by First Trust Company of North Dakota are approved for payment from share of the Guy and Selma Kjorvestad Estates distributable to Eileen Conway. First Trust Company may allocate such payments between the estates as it deems reasonable.

4. The Personal Representative shall

distribute to Eileen Conway 300 shares of Otter Tail Company common stock; one-half of coin collection based of selection and appraisals to be determined at the discretion of the Personal Representative, and one-half of the balance of the account, less $16,000 for difference in previously stipulated land values; less $3,000 for different in automobiles transferred; as per previous stipulation of the parties, less approved fess and costs.

5. The Personal Representative shall distribute to Lorraine Parker 300 shares of Otter Tail Power Company stock one half of coin collection based upon values and selections as determined in the discretion of the Personal Representative; and one-half of the balance of the account, plus $16,000 for difference in land values; plus $3,000 for difference in residence value; less $250 for difference in auto-

values; as per the previous stipulation of the parties.

6. The successor Personal Representative shall be discharged from all claims or demands of any interested person as to matters relating to the accounting and distribution of this estate as determined by this Order.

7. First Trust Company of North Dakota shall be discharged and released from its duties as Personal Representative, subject only to distribution as provided under this Order.

AMENDED ORDER

Upon the foregoing Amended Finding of Fact and Conclusions of Law, it is ORDERED that the account, as described, be allowed and that distribution and discharge upon the terms and conditions set forth in the Conclusions of Law be authorized and approved.

Dated this 5th day of December, 1985.

Ronald Dosch

County Judge

Amended Findings of Fact, Conclusions of Law and Order Upon Remand, prepared by:

Law Offices of Pancratz, Yuill, Wold, Johnson & Feder, P.C., Professional Corporation, 414 Gate City Building, P. O. Box 1680, Fargo, North Dakota 58107, Telephone (701) 235-5515

Filed by Clerk October 28, 1986
Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

IN THE MATTER OF THE ESTATE OF
GUY KJORVESTAD, SR., DECEASED, AND
IN THE MATTER OF THE ESTATE OF
SELMA KJORVESTAD, DECEASED.
First Trust Company
of North Dakota,

Petitioner and Appellee

v.

Eileen Conway

Respondent and Appellant

Civil Nos. 11, 173-11,174

Appeal from the County Court of Nelson County, Northeast Central Judicial District, the Honorable Ronald M. Dosch, Judge.

APPEAL DISMISSED.

Opinion of the Court by Meschke, Justice.

Pancratz, Yuill, Wold, Johnson & Feder, P. W. Box 1680, Fargo, ND 58107, for petitioner and appellee; argued by J. Philip Johnson.

Eileen Conway, 2922 S. Germantown Road, Germantown, TN 38138, for respondent and appellant; appeared pro se.

First Trust Co. v. Conway

Civil Nos. 11, 173 and 11, 174

MESCHKE, Justice.

In the Matter of Estate of Kjorvestad, 375 N.W. 2d 160, 171 (N.D. 1985), ["KjorvestadV"] we deem Eileen Conway's fifth appeal frivolous and directed "that First Trust be paid its reasonable compensation, attorney's fees and costs on [the] appeal as determined and approved by the county court, from the remaining share of the estates distributed to Conway." Upon remand, the county court approved payment of $6,739.89 in compensation, attorney's fees and costs for the

appeal. Conway has appealed again, making this "Kjorvestad VI[1]. We dismiss her appeal because the order was entered without notice and because Conway did not seek a hearing before appealing.

After remand of Kjorvestad V, counsel for First Trust simply mailed an affidavit and a proposed "Amended Order Upon Remand" to County Judge and to Conway. The affidavit listed First Trust's compensation, attorney's fees and costs for that appeal. The Amended Order upon Remand was the same as that affirmed on appeal, except that findings were added about the amount of compensation, attorney's fees and costs for the appeal and that amount was ordered paid from Conway's share of the estates.

Unfortunately, counsel for First Trust did not give notice of hearing to Conway under S10.1-18-21. Without a hear-

ing, the county court promptly entered the Amended Order Upon Remand on December 5, 1985. On December 10, 1985, counsel for First Trust notified Conway of entry of the Amended Order Upon Remand, but did not give notice of taxation of costs under N.D.Civ.P. 54(e), as perhaps might have been done. See City of Grand Forks v. Henderson, 297 N.W.2d 450, 451 (N.D. 1980) ("Costs including attorney's fees as allowed by law are taxed as part of the judgement.") Conway appealed on February 1, 1986, arguing that she was deprived of a hearing on the reasonableness of the amounts of compensation and attorney's fees.

On our own initiative, we consider whether an appeal is authorized by statute. Olson v. Job Service North Dakota, 379 N.W.2d 285 (N.D. 1985)

N.D.C.C., S28-27-02, which describes the orders reviewable by this court,

declares in subsection 7:

> "An order made by the district court or judge thereof without notice is not appealable, but an order made by the district court after a hearing is had upon notice which vacates or refuses to set aside an order previously made without notice may be appealed to the supreme court when by the provisions of this chapter an appeal might have been taken from such order so made without notice, had the same been made upon notice."

This precludes appeal of an order entered without notice or hearing "until such time as the judge who made the order has a chance to reconsider his decision in an adversary proceeding." Beck v. Smith, 296 N.W.2d 886,88 (N.D. 1980), See also Production Credit Association of Minot v. Schlak, 383 N.W.2d 826, 828 (N.D. 1986). Because this Amended Order Upon Remand was entered without notice or hearing, it is not appealable and we dismiss the appeal.[2]

Conway may yet seek a hearing on the reasonableness of the amounts of compensation, attorney's fees and costs.[3]

N.D.C.C. S30.1-18-18 provides:

> "After notice to all interested persons, or on petition of an interested person, or on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative including any attorney, auditor, investment adviser, or other specialized agent or assistant, the reasonableness of the compensation determined by the personal representative for his services may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds." (emphasis supplied)

If Conway seeks a hearing, the only issue to be considered is the reasonableness of the amounts paid for that appeal, Conway cannot continue to reargue and relitigate cumulative amounts of compensation and attorney's fees for all the prior proceedings, as she tried to do on this appeal. "[A]t some point, there must be an end to litigation so that the parties may go about their normal business." Lang v Bank of North Daota, 377 N.W. 2d 575, 579 (N.D. 1985)

We caution Conway that First Trust is entitled to additional reasonable compensation and fees for its participation in any further hearing which she obtains to consider the reasonableness of amounts charged to her, unless she convinces the county court that the amounts allowed were unreasonable. For example, see Jones v. MacMillan Bloedel Containers, Inc., 685 F2d 236 (Ith Cir. 1982). Conway cannot continue to impose her obsessions on others without consequence. To avoid perpetuation of this dilemma, we suggest that the county court make any award therefore at the hearing, when and if it is held.

We want to end this ordeal. If Conway seeks a further hearing and further appeals (unless she should prevail on that appeal), we will direct First Trust to submit its verified and itemized statements for such eompensation, fees and

costs to this court for our action under N.D.R.App.P. 27. While this is not our usual approach to award attorney's fees on appeal, see Wolfe v. Wolfe, 391 N.W. 2d 617, 621 (N.D. 1986) (Levine, J.,concurring specially), we view it as necessary to bring finality to this affair. Compare In re Nordbrock, 772 F. 2d 397, 401 (8th Cir. 1985)(prevailing party to submit verified and itemized bill for attorney's fees and expenses for Court of Appeal's review and approval within fifteen days).

First Trust seeks compensation and attorney's fees for this appeal from Conway under N.D.R.App.P. 38, but under the circumstances, we make no such award. See Ginsburg v. Ginsburg, 352 F2d 337, 338 (9th Cir. 1965).

This appeal is dismissed.

Herbert L. Meschke

Vernon R. Pederson

Gerald W. VandeWalle

H. F. Gierke III

Ralph J. Erickstad, C. J.

PEDERON, S.J., sitting in place of LEVINE, J., disqualified.

[1]See Conway v. Parker, 250 N.W. 2d 266 (N.D. 1977); Matter of Estates of Kjorvestad, 287 N.W.2d 465 (N.D. 1980) Matter of Estates of Kjorvestad, 304 N.W. 2d 83 (N.D. 1980); First Trust Company of North Dakota v. Conway, 345 N.W. 2d 838 (N.D. 1984); and Matter of Estate of Kjorvestad, 375 N.W.2d 160 (N.D. 1985)

[2]First Trust earlier moved to dismiss this appeal on other ground, which we denied. This issues was not raised at that time.

[3]First Trust suggest that Conway failed to timely move pursuant to N.D.R.Civ.P. 52(b) that the county court amend its findings. Since it is palin that Conway can oftain a hearing under N.D.C.C. S30.1-18-21 when she was notified of court approval of the amounts of eompensation and attorney's fees, Rule 52(b) is not applicable.

File Nos. 11,173-11,174

STATE OF NORTH DAKOTA ss

IN THE SUPREME COURT

Appeal from the (County) Court of Nelson

IN THE MATTER OF THE ESTATE OF
GUY KJORVESTAD, SR., DECEASED, AND
IN THE MATTER OF THE ESTATE OF
SELMA KJORVESTAD, DECEASED.

First Trust Company of
North Dakota, Petitioner and Appellee

v.

Eileen Conway Respondent and Appellant

This appeal having been heard by the Court at the September, 1986 term before: The Honorable Ralph J. Erickstad, Chief Justice; the Honorable Gerald W. Vande-Walle, the Honorable H.F. Gierke III, the Honorable Herbert L. Meschke, the Honorable Vernon R. Pederson, Surrogate Judge, Justices:

and the Court having considered the appeal, it is ordered and adjudged that the

APPEAL FROM THE (order) of the court below be and the same is hereby DISMISSED. It is further ordered and adjudged that Neither Party recover costs and have and disbursements on this appeal, to be taxed and allowed in the court below.

Dated October 28, 1986.

Attest: Luella Dunn

Clerk of the Supreme Court

Ralph J. Erickstad

Chief Justice

North Dakota Supreme Court

IN COUNTY COURT OF NELSON COUNTY

STATE OF NORTH DAKOTA

In the Matter of the Estates of Guy Kjorvestad and Selma Kjorvestad, Deceased.

FINDINGS AND ORDER APPROVING FEES

The Court, upon its review of the testimony presented and exhibits received at a hearing February 10, 1987 on the petition of First Trust Company of North Dakota, as Personal Representative of the Estates of Guy Kjorvestad and Selma Kjorvestad, for approval of Personal Representative and attorney's fees makes the following findings:

1. Petitioner's exhibits 1, 2, 3, and 4 represent a fair and accurate summary of the expenses incurred and services rendered in the administration of the above referenced estates. The exhibits sufficiently indicate the amounts due and owing the Personal Representative and the attorney. The Court will require no fur-

er documentation of the same.

2. The testimony of Pamela Anderson as an employee of First Trust Company of North Dakota familiar with the instant estates as well as experienced in the administration of other estates is accurate and trustowrthy.

3. The record is void of any indications that the billings are unreasonable, and, based on Pamela Anderson's testimony that the billings were computed in the usual manner for estate practices, the Court hereby approved the same.

4. This Court deems it necessary, in the face of the history of continuing litigation in this case, to authorize the Personal Representative to pay for future services of the Personal Representative and the attorneys based on the same criteria the Court used to allow payment of the fees requested in the January 1987 petition of the Personal Representative.

Said crieria to include (but not be limited to): common accounting practices used by persons administering estate affairs and appropriate hourly rates of attorneys considering the expertise necessary.

5. The Court reviewed numerous North Dakota Supreme Court cases relative to the Kjorvestad estates and finds Attorney Johnson's request for costs and fees incurred in his defense of the current and any future complaints and investigations of the Disciplinary Board of the Supreme Court to be appropriate and timely. Dr. Eileen Conway's propensity to spur litigation and inquiries is evident. The cost of defending such claims should not rest on those persons who successfully defended them The cost of the defense of Attorney Johnson shall be assessed to Dr. Conway's portion of the estate. In the event the complaint is upheld by the Disciplinary Board, Attorney Johnson

shall be responsible for those expenses personally.

CONCLUSIONS OF LAW AND ORDER

Based on the foregoing findings, the Court makes the following conclusions of law:

The billings presented to the Court for Attorney's fees and Personal Representative's fees in the Estate of Guy Kjorvestad and Selma Kjorvestad are reasonable and allowed in full. Payment of reasonable fees for future services and expenses shall be allowed without prior approval of this Court provided, the fees are "reasonable" according to the criteria outline in finding #4.

Defense costs incurred by Attorney Johnson relating to the current and any future Disciplinary Board actions taken by Dr. Eileen Conway shall be assessed against and paid out of Dr. Conway's portion of the estates, unless the Disciplinary Board finds the complaints to be

meritorious, in which case, Mr. Johnson will bear the cost of his defense.

It is therefore ordered payment be allowed in the amount of $5,058.40 to First Trust Company of North Dakota and $8,762.36 to Attorney J. Phillip Johnson. Additional reasonable fee payments to the attorneys and the Personal Representative shall be allowed for future services or costs incurrred. Defense costs of the Disciplinary Board actions sahll be paid from Dr. Conway's share of the above estates unless the complaint prevails.

Dated this 23rd day of February, 1987

BY THE COURT:

JONAL H. UGLEM

NELSON COUNTY JUDGE

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

First Trust Company of

North Dakota, Petitioner and Appellee

v.

Eileen Conway Respondent and Appellant

In the matter of the Estates of Guy Kjorvestad and Selma Kjorvestad, Civil No. 870110 and 870111

Appeal from County Court of Nelson County, the Honorable Jonal H. Uglem, Judge.

AFFIRMED IN PART AND REVERSED IN PART.

Opinion of the Court by VandeWAlle, Justice.

J. Philip Johnson, of Yuill, Wold, Johnson & Federa, P.C., Fargo, for petitioner and appellee.

Eileen Kjorvestad Conway, respondent and appellant, Germantown, Tennessee, pro se.

Civil Nos. 870110 and 870111

FIRST TRUST CO. V. CONWAY

VandeWalle, Justice.

Eileen Conway appealed from an order of the trial court determining that the billings for attorney fees and personal representative fees in these estates were reasonable. We affirm in part and reverse in part.

This is the seventh appeal involving these estates to which Conway is an heir. The history of this case is related in our previous opinions: Conway v. Parker, 250 N.W.2d 266 (N.D. 1977) [Kjorvestad I], Matter of Estates of Kjorvestad, 287 N.W.2d 465 (N.D. 1980) [Kjorvestad II], Matter of Estates of Kjorvestad, 304 N.W.2d 83 (N.D. 1981) [Kjorvestad III], First Trust Company of North Dakota v. Conway, 345 N.W.2d 838 (N.D. 1984) [Kjorvestad IV], Matter of Estate of Kjorvestad, 375 N.W.2d 160 (N.D. 1985) [Kjorvestad V], and Matter of Estate

of Kjorvestad, 395 N.W.2d 162 (N.D. 1986) [Kjorvestad VI].

The facts pertinent to this appeal are as follows: In Kjorvestad V we affirmed an order of the trial court approving a final accounting and ordering final distribution of the combined estates. At that time we also exercised our power under Rule 38, N.D.R.App.P., to award the personal representative, First Trust Company of Fargo (First Trust), "its reasonable compensation, attorney's fees and costs on this appeal out of Conway's share of the estate only," as a method of dealing with Conway's unrestrained and unsubstantiated accusations. 375 N.W.2d at 171.

Subsequently, on remand, First Trust mailed an affidavit and a proposed amended order to the trial court. However, it failed to give notice of a hearing to Conway. The trial court then entered and the amended order, and Conway appealed. That

appeal was denominated Kjorvestad VI. In that decision we dismissed the appeal because Conway had failed to seek a hearing before appealing. 395 N.W.2d at 162.

Subsequent to our decision in Kjorvestad VI, First Trust again applied for approval of fees. In its application First Trust asked the trial court (1) to approve an amount of fees consistent with our decision in Kjorvestad V; (2) for approval of attorney fees and personla representative fees incurred subsequent to the decision in Kjorvestad V; and (3) for authorization to pay usual and customary personal representative fees and attorney fees without further order of the court. A hearing was held on February 10, 1987. On February 23, 1987, the trial court issued its order approving fees and authorizing future fee payments as set forth in First Trust's application. The order also provided that the costs of the defense of any disciplinary

complaints against First Trust's attorney which were initiated by Conway should be borne by Conway unless found to be meritorious. It is from this order that Conway appealed.

We note that Conway's brief is not confined to the order at issue in this case but is yet another vitriolic attack on the entire course of the proceedings chronicled in our previous decisions. The brief contains vilifying accusation, all of which are unsubstantialed. We do glean from Conway's brief that she also takes issue with the order issued by the trial court. That order consists of two parts and we will analyze them separately.

The first part of the order consists of a determination that the billings presented for attorney fees and personal representative fees are reasonable, and awarding specific amounts; additionally, there is a determination that future pay-

ments for reasonable attorney and personal representative fees are allowed, based on criteria set forth in the order. After reviewing the record we cannot conclude that these determinations are clearly erroneous and therefore they are affirmed. Rule 52 (a), N.D.R.Civ.P.

The second part of the order directs that the costs of defending First Trust's attorney in current and future lawyer disciplinary actions brought before the Disciplinary Board, which are initiated by Conway, be paid from Conway's share of the estates. This order was based solely upon a request by Counsel for First Trust in his closing statement at the hearing that, "in view of the unusual circumstances with respect to the filing of a disciplinary complaint, directing arising out of the administration of these estates, we are requesting that...professional time and expenses attributable to those hearings..

be included as an expense..." Because we believe that disciplinary proceedings are beyond the scope of the probate proceedings, we conclude that the trial court erred in ordering Conway to pay current and future costs of disciplinary actions brought against counsel for First Trust. Therefore, we reverse that part of the order.

On appeal First Trust has requested that we award it costs and attorney fees pursuant to Fule 38, N.D.R.App.P., to be paid out of Conway's share of the estates. Rule 38 provides that "If the court determines that an appeal is frivolous,...it may award just damages and single or double costs including reasonable attorney's fees." We have stated that "An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which could be seen as evidence of bad faith." Mitchell v. Preusse, 358 N.W.2d 511, 514

(N.D. 1984).

Normally, when we reverse part of an order or judgment on appeal, we do not deem that appeal to be frivolous. See, e.g., Matter of Estates of Gustafson, 381 N.W. 2d 308 (N.D. 1986). However, in this case we believe that Conway's extremely litigious nature, her determination to continuously rehash the entire course of the probate proceedings, and the vitriolic nature of her arguments, which only minimally touched on the merits of the order at issue in this case, demonatrate "persistence in the course of litigation which [can] be seen as evidence of bad faith."N.D.R.App.P.

First Trust did not include an affidavit documenting the work performed on this appeal in its request for costs and attorney fees under Rule 38. We have previously stated:

> "We suggest that if more than a token amount of attorney fees is sought in a request to this court to impose monetary sanctions under Rule 38, N.D. R. App.P., the request should be accompanied by an affidavit documenting the work performed on the appeal to enable us to calculate the amount of reasonable attorney fees to be assessed." United Bank of Bismarck v. Young, 401 N.W.2d 517, 519, fn. 1 (N.D. 1987)

Because there was no affidavit documenting work on this appeal, we award only double costs and attorney fees in the amounts of $250, which are to be paid out of Conway's share of the estates.

Gerald W. VandeWalle

Vernon R. Pederson S.J.

Herbert L. Meschke

H.F. Gierke III

Ralph J. Erickstad, Ch.J.

PEDERSON, S.J., sitting in place of LEVINE, J., disqualified.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

JUDGMENT

Eile Nos. 870110 & 870111

Appeal from the County Court of Nelson County.

IN THE MATTER OF THE ESTATE OF GUY KJORVESTAD, SR., DECEASED

First Trust Company of North Dakota, Petitioner and Appellee

v.

Eileen Conway Respondent and Appellant

This appeal having been heard by the Court at the April, 1988, term before:

The Honorable Ralph J. Erickstad, Chief Justice; the Honorable Gerald W. VandeWalle, the Honorable H.F. Gierke III, the Honorable Herbert L. Meschke, the Honorable Vernon R. Pederson, Surrogate Judge, Justices; and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the order of the court below be and the same is here-

by AFFIRMED IN PART AND REVERSED IN PART CONSISTENT WITH THE OPINION FILED HEREWITH. It is further ordered and adjudged that Appelle have and recover from Appellant double costs and attorney fees in the amount of $250, which are to be paid out of Appellant's share of the estate.

Dated: May 16, 1988.

By the Court:

Ralph J. Erickstad

Chief Justice

North Dakota Supreme Court

Attest: Luella Dunn

Clerk of the Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

File Nos. 870110 & 870111

IN THE MATTER OF THE ESTATE OF

GUY KJORVESTAD, SR., DECEASED

First Trust Company of

North Dakota, Petitioner and Appellee

v.

Eileen Conway Respondent and Appellant

ORDERED, that page 5 of the opinion filed in these cases on May 16, 1988, be deleted and that page 5 filed this day be sustituted therefor.

The Supreme Court of the State of North Dakota convened at 11 a. m. this 28th day of June, 1988, with the Chief Justice, the Honorable Ralph J. Erickstad; the Honorable Gerald W. WandeWalle, the Honorable H.F. Gierke III, the Honorable Herbert L. Meschke, the Honorable Vernon R. Pederson, Surrogate Judge, Justices; and the Deputy Clerk of the Supreme Court, Benny Barry,

being present and directed the entry of the above order.

Penny Barry

Deputy Clerk

North Dakota Supreme Court

Filed by Clerk Jun 28 1988
Supreme Court

we believe that future disciplinary proceedings are beyond the scope of the probate proceedings, we conclude that the trial court errred in ordering Conway to pay future costs of disciplinary actions brought against counsel for First Trust. Therefore, we reverse that part of the order.

On appeal First Trust has requested that we award it costs and attorney fees pursuant to Rule 38, N.D.R.App.P., to be paid out of Conway's share of the estates. Rule 38 provides that "If the court determines that an appeal is frivolous,...it may award just damages and single or double costs including reasonable attorney's."

We have stated "An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which could be seen as evidence of bad faith." Mitchel v. Preusse, 358 N.W.2d 511, 514 (N.D. 1984)

Normally, when we reverse part of an order or judgment on appeal, we do not deem that appeal to be frivolous. See, e.g. Matter of Estates of Gustafson. 381 N.W.2d 208 (N.D. 1986). However, in this case we believe that Conway's

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

PETITION FOR REHEARING

File Nos. 870110 & 870111

Appeal from County Court of Nelson County

IN THE MATTER OF THE ESTATE OF

GUY KJORVESTAD, SR., DECEASED

First Trust Company of

North Dakota Petitioner and Appellee

v.

Eileen Conway, Respondent and Appellant

This appeal having been heard by the Court at the April, 1988 term before: The Honorable Ralph J. Erickstad, Chief Justice; the Hnorable Gerald W. VandeWalle, the Honorable H.F. Gierke III, the Honorable Herbert L. Meschke, the Honorable Vernon R. Pederson, Surrogate Judge, Justices; and a petition for rehearing upon the appeal and supporting Affidavit herein having been filed by J. Philip Johnson for the Appellee; and the Court having

substituted page 5 of the original opinion; and petitions for rehearing having been filed by Eileen Conway, pro se, for the Appellant; and the court having advised thereon, it is no here considered, ORDERED AND ADJUDGED, that the petitions be and the same are hereby DENIED.

AND IT IS FURTHER ORDERED, that this case be and it is hereby remanded to the County Court for further proceedings according to law, and the judgment of this court.

Dated: June 28, 1988

By the Court:

Ralph J. Erickstad

Chief Justice

North Dakota Supreme Court

Attest: Penny Barry, Deputy

Clerk of the Supreme Court

STATE OF NORTH DAKOTA

OFFICE OF STATE TAX COMMISSIONER

STATE CAPITOL, BISMARCK, NORTH DAKOTA 58505

701-224-277-

Kent Contrad COMMISSIONER

May 28, 1981

Phil Stafne

Attorney at Law

P. O. Box 1680

Fargo, ND 58107

Re: Estate of Selma Kjorvestad

Date of Death - May 15, 1974

Dear Mr. Stafne:

In veiw of the fact that this decedent passed away prior to July 1, 1975, this matter must be processed through the county court as provided for under Chapter 57-37, North Dakota Century Code, which was in force on the date of death.

To effectively finalize matters regarding this estate, an amended Form 131 must be prepared and submitted to the Nelson Coun-

ty Court.

THIS IS THE FINAL NOTICE OF FILING REQUIREMENT WHICH WILL BE ISSUED FROM THE OFFICE OF THE TAX COMMISSIONER.

Sincerely,

Bonnie Orndorg

Estate Tax Examiner

Phone: 224-3470

STATE OF NORTH DAKOTA

SUPREME COURT

No. 870110

IN THE MATTER OF THE

ESTATE OF GUY KJORVESTAD, SR., DECEASED.

First Trust Company,

Appellee,

vs.

Eileen Conway

Appellant,

On Appeal from Judgment Entered in

Nelson County Court

Northeast Central Judicial District

PETITION FOR REHEARING

Dr. Eileen Kjorvestad Conway
Attorney Pro Se
2922 Germantown Road South
Germantown, Tennessee 38138

This Petition for Rehearing stems from the sealing of the public records in the offices of the Nelson County Judge, the Nelson County Clerk of Court and the Nelson County Register of Deeds. First Trust, Johnson and Audrey Swanke, Nelson County Clerk of Court, Nelson County Register of Deeds and former Nelson County Judge, engaged in a criminal conspiracy to obstruct justice in order to cover-up massive fiduciary fraud by First Trust in the probate of the Estate of Guy Kjorvestad, Sr. It was necessary for First Trust and Johnson to induce Swanke to seal the Docket File of the Estate of Guy Kjorvestad, Sr. in order to block examination of underground hearings and illegal, secret, counterfeit court orders signed in the Nelson County Underground Probate Court.

Rule 30(a)(d) of the North Dakota

Court Rules requires copies of the relevant entries of the Docket File of the Estate of Guy Kjorvestad, Sr. in the Appendix of the Brief of Conway's appeal to the North Dakota Supreme Court. Moreover, there is a provision in the North Dakota Constitution under Article XI, Section 5 and Section 6 which require all records of public or governmental bodies to be open to the public and accessible for inspection. There is no law in the North Dakota Century Code or in the North Dakota Constitution that would exempt the record of the entries into the Docket File of the Estate of Guy Kjorvestad, Sr. kept by the Clerk of Court Swanke. The North Dakota Constitutional provision was upheld in State v. First State Bank, 52, ND 231, 202 NW 391. The penalties against Swanke for tampering with public records is provided for in Section 12.1-11-05 and Section 44-04018.

Because the Docket File of the Estate of Guy Kjorvestad, Sr. illegally was sealed by Swanke and Nelson County Judge Jonal Uglem, Conway was foreclosed from complying with Rule 30. Conway was blocked from providing proof of massive fiduciary fraud by First Trust in her brief and prevented from effectively arguing her case before the North Dakota Supreme Court.

Each time Conway the sole designated Executrix and beneficiary in Guy Kjorvestad's two wills, has attempted to examine the Probate File of her father, Swanke became emotionally unstable;
(1) Swanke, in an uncontrolled, irrational manner threatened physical violence if Conway ever asked to see the probate files of her father's or mother's estates;
(2) Swanke, in an uncontrolled psychotic manner threatened, "I'll call the Sheriff and have you arrested if you ever dare ask to see the probate files of your par-

ents' estates!"

Because of Swanke's uncontrolled and unpredictable behavior Conway used the safety of long-distance telephone calls to request copies of the Docket File of the Estate of Guy Kjorvestad, Sr. from Swanke for the Appendix of Conway's appeal to the North Dakota Supreme Court. Over a period of six months, Swanke and Deputy Clerk of Court, Susan Pedersen, refused dozens of requests for copies of the docket files stating the Docket File of the Estate of Guy Kjorvestad, Sr. is not a part of the Probate File of his estate and the North Dakota Supreme Court does not have a right to examine it.

Conway was unable to comply with Rule 30 in perfecting her appeal to the North Dakota Supreme Court because she was barred from examining the Docket File and denied copies. When Conway shipped her briefs and appendices to Mrs. Luella

Dunn, Clerk of the North Dakota Supreme Court, Conway included a note to Mrs. Dunn stating that she had been unable to secure copies of the docket files of her father's and mother's estates but would send them in separate appendices later.

Conway mailed a certified letter with a check for the costs of copying to Clerk of Court Swanke requesting copies of the Docket File of the Estate of Guy Kjorvestad, Sr. In a letter Swanke again refused to send copies of the Docket File of the Estate of Guy Kjorvestad. Sr. and returned Conway's check. (App. p. 1)

Nick Vogel, Conway's attorney, in a second letter requested copies of the Docket File of the Estate of Guy KJorvestad, Sr. and the Docket File of the Estate of Selma Kjorvestad and enclosed a check to cover the expense of copying. Again, Swanke refused and returned Vogel's check (App. p. 2)

In an effort to comply with Rule 30 of the North Dakota Court Rules before Oral Argument on April 12, 1988, Conway flew to North Dakota on January 30th and drove in a rented care through a blizzard to Lakota on January 31st. When Conway went to the office of the Nelson County Judge on February 1st, Clerk of Court Swanke was out of town. Deputy Clerk of Court Susan Pederson arrogantly informed Conway that she was not allowed to examine the Docket File of the Estate of Guy Kjorvestad, Sr. or the Docket File of the Estate of Selma Kjorvestad and refused copies of the docket files for her appendices in her appeal to the North Dakota Supreme Court, in conflict with the North Dakota Supreme Court, the statutes and the North Dakota Constitution.

Conway relentlessly pursued her efforts to examine the Docket File. On

April 4, 1988, Conway filed Petition to Inspect Probate File, Including Docket File of the Estate of Guy Kjorvestad, Sr. and Petition to Inspect Probate File, Including Docket File, of the Estate of Selma Kjorvestad. Incongruously, the Nelson County Judge, Jonal Uglem, has ruled that the Docket File of the Estate of Guy Kjorvestad, Sr. and the Docket File of the Estate of Selma Kjorvestad is "office information and not available for public information". Nelson County Judge Jonal Uglem considers Conway, the beneficiary of the Estate of Guy KJorvestad. Sr. and the Estate of Selma Kjorvestad, "the public". (App. p. 3)

Conway's family has farmed in Nelson County for 114 years since it was Dakota Territory. Conway's parents were born in Nelson County, farmed and paid taxes in Nelson County for 65 years but Nelson County and the State of North Dakota failed

to protect their cash-heavy, debt-fee estates in the Nelson County Probate Court and even denied Guy Kjorvestad, Sr. and Selma Kjorvestad the right of having their estates probated with dignity.

When Conway expressed concern to Swanke that there had never been a single accounting of either her father's or mother's estate but all of their cash assets had disappeared in the Nelson County Probate Court, Swanke succinctly summed up her concept of probate responsibility in Nelson County,

"So what? They're dead now!"

This is why a member of the Joint Committee of Professional Discipline of the National Center of Professional Responsibility of the American Bar Association lamented the depth and breadth of frothy judicial corruption in North Dakota:

"North Dakota has been targeted as the prime problem state for judicial corruption. The North Dakota Judicial System is so corrupt that going into court there is like falling into the nineteenth century world of Charles Dickens. Judicial and lawyer discipline are simply non-existent! Ralph [Erickstad] prsides over a band of cut-throat thieves. When we have gone in there to clean up the corruption and raise standards we have met only hostility and resentment from the justices of the North Dakota Supreme Court."

The Chamberlain of the Nelson County Underground Probate Court

The weapon-of-choice of First Trust and Johnson, a former North Dakota Supreme Court Justice, in fiduciary fraud and Mafia-style fiduciary terrorist tactics has been the Nelson County Underground Probate Court. Nelson County Clerk of Court, Nelson County Register of Deeds and former Nelson County Probate Judge, Audrey "So-what-they're-dead-now!" Swanke, was willing to seal the Docket File of the Estate of Guy Kjorvestad, Sr. to cover-up massive fiduciary fraud in

First Trust's underground hearings and illegal, secret, counterfeit court orders in the Nelson County Underground Probate Court because Audrey "So-what-they're-dead-now!" Swanke had already been compromised:

1. In violation of the North Dakota Constitutional Provision that prohibits tampering with probate records, Section 12.1-11-05, Audrey Swanke removed First Bank checking account records of the Estate of Guy KJorvestad, Sr. (which simply vanished for 5 years) and hid the bank statements and cancelled checks in her private office for 19 months to cover-up missing deposits and 5 checks to which the signature "Eileen Conway" had been forged.

On June 24, 1976, Parker, Pearson and Youngern mailed a fragmentary response to Conway's second court order (they defied the first court order) to surrender ten large boxes of records belonging to the estates. Between June 24, 1976, when the

when the letter with the inventory of contents of a small envelope was mailed, and July 2, 1976, when Conway flew to North Dakota to search the records for the missing First Bank checking account, Judge "Sowhat-they're-dead-now!" Swanke removed the bank statements and cancelled checks, including 5 checks to which the signature, "Eileen Conway" had been forged, and hid them in her private office for 19 months to cover-up the forgeries and missing deposits.

2. Judge Swanke comingled bond money with her own funds.

(a) On November 26, 1975, Conway paid a $100.00 in cash for a bond. For 9 years Judge Swanke denied that Conway had paid the $100.00 cash bond. Nine years later when Conway found the 9-year old receipt, the Nelson County Treasurer informed Conway the Judge Swanke had "found" the $100.00 in cash in the

top drawer of her desk. To cover-up the bond money missing for 9 years, the former Judge Swanke and Judge Ronald Dosch opened a checking account where they deposited $100.00 in cash that had been unnoticed in Judge Swanke's top drawer for 9 years and mailed a check to Conway's lawyer.

(b) The former Judge Swanke repeatedly has refused to refund $250.00 cash bond paid by Conway several years ago.

3. On July 26, 1977, the docket files were falsified to cover-up a fraud scam against the Estate of Guy Kjorvestad, Sr. and his beneficiary, Conway.

4. It was discovered recently that fear of exposure of the July 26, 1977 fraud scam and the stolen First Bank checking account statements with 5 forged checks hidden in Judge Swanke's private office for 19 months triggered Swanke's psychotic violent rampage throu-

the Nelson County Courtroom after Conway asked for an accounting of $665,000.00 in cash and stated that a checking account for her father's estate had simply vanished for 5 years on January 23, 1978. The emotionally unstable, uncontrolled, irrational, six-foot Audrey Swanke physically assaulted Conway twice and compelled her to sign illegal, fraudulent deeds to 3520 acres of farmland in order to cover-up probate fraud.

Miss Helen Berg, Staff Attorney for the North Dakota Commission of Judicial Qualifications discredited herself when she failed to investigate this heinous crime after Conway filed a complaint.

Although there were 4 witnesses who could have been put under oath, Miss Berg not only failed to investigate Judge Swanke's two occurences of assault and battery in the courtroom but took steps to cover-up the violence and denied that

it ever happened. Following "The Law of Unexpected Consequences", Judge Swanke formally acknowledged the two occurrences of assault and battery in the Nelson County Courtroom and officially withdrew as Nelson County Probate Judge for the Estate of Selma Kjorvestad on January 15, 1979 in a letter filed in the Nelson County Probate Court. Moreover, in seven additional documents lawyers joked about Judge Swanke's ten-minute violent rampage through the Nelson County Courtroom and alluded to the force used by the six-foot psychotic judge to compel Conway to sign deeds to 3520 acres of farmland.

5. Because Judge Swanke(a) had been compromised on July 26, 1977 and (b) had stolen bank statements and cancelled checks from the probate file and hid them in her private office for 19 months, a lawyer black-mailed Swanke and forced her to sign an illegal, secret, counter-

feit court order in the Nelson County Court (after she had officially withdrawn as judge for assault and battery in the courtroom) to defy an order issued by the U.S. Comptroller of the Currency to Ramsey National Bank and Trust Company to release $183,426.25 which Ramsey Bank illegally held in a checking account for over a year in order to collect 22% interest on loans.

6. Judge Audrey "So-what-they're-dead-now!"Swanke ordered Jim Winters, Vice President of First Bank not to give any information about $232,994.65 belonging to the Estate of Guy Kjorvestad, Sr. and the Estate of Selma Kjorvestad to Eileen Conway, the Executrix of the Estate of Guy Kjorvestad,Sr. and the Estate of Selma Kjorvestad. Mr. Winters viciously blocked Conway until the Counsel of the U.S. Comptroller of the Currendy ordered the President of First Bank, W.L. Connelly, to surrender the records.

One month after their appointment, October 22, 1980, First Trust and Johnson, a former North Dakota Supreme Court Justice, slandered and defamed Guy Kjorvestad, Sr. in U. S. District Court as "a hopeless drunk" and "incompetent" and then demanded that Guy Kjorvestad's estate pay them $188,000.00 for three hours of slander and defamation. Guy Kjorvestad, Sr. in his grave, has indicted First Trust and Johnson, a former North Dakota Supreme Court Justice, for massive fiduciary fraud, probate fraud and estate tax fraud. First Trust and Johnson, a former North Dakota Supreme Court Justice, were so confident that Johnson's former associate justices on North Dakota's highest court would cover-up their fiduciary fraud they carelessly left a trail of felonies in their wake.

With the kind of inevitability that so often characterizes judicial corrup-

tion, the crimes committed against the Estate of Guy Kjorvestad, Sr. unravelled and the scandal unfolded. Plato's dialogues in The Republic on the just and the unjust stripped of appearances are as appropriate in 1988 as they were in 410 B.C:

> "First, let the unjust be like other distinquished masters of craft; like the skillful pilot or physician who knows intuitively his own powers and keeps within their limits, and who, if he fails at any point, is able to recover himself. So, let the unjust make his unjust attempts in the right way, and lie hidden if he means to be great in his injustice (he who is found out is nobody!); for the highest reach of injustice is : to be deemed just when you are not. Therefore I say that in the perfectly unjust man we must assume the most perfect injustice; there is to be no deduction, but we must allow him, while doing the most unjust acts, to have acquired the greatest reputation for justice. If he has taken a false step he must be able to recover himself; he must be one who can speak with effect, if any of his deeds come to light, and who can force his way where force is required by his courage and strength, and command of money and friends."

First Trust and Johnson, a former North Dakota Supreme Court Justice, demanded that public records of the offices of the Clerk of Court, Register of Deeds, Nelson County Probate Court be sealed from Guy Kjorvestad's beneficiary to cover-up fiduciary fraud. First Trust and Johnson have demanded that justices of the North Dakota Supreme Court renounce their sacred oaths of office, secrecrate the public trust, throw out the North Dakota Century Code, rip up the North Dakota Constitution, tear up the Constitution of the United States of America to cover-up the crimes of cut-throat thieves.

CONCLUSION

Based on the foregoing points, Conway requests that this Court unseal the Docket File of the EState of Guy Kjorvestad, Sr. open the Probate File of the Estate of Guy Kjorvestad, Sr., open the

public records in the office of the Register of Deeds and allow Conway access to documents to enable her to be more effective in preparing her case and documenting proof of massive probate fraud. The North Dakota Constitution guarantees Conway access to the records of the Nelson County Probate Court and the records of the office of the Register of Deeds. The Fourteenth Amendment of the Constitution of the United States affords Conway the right of due process of law and equal protection of the laws.

Eileen Kjorvestad Conway, Ph. D.

NELSON COUNTY CLERK OF COURT

Post Office Box 565

Lakota, North Dakota 58344

Audrey I. Swanke, Clerk Telephone

Susan R. Pederson, Deputy 701-247-2462

December 11, 1987

Ms. - Dr. Eileen Kjorvestad Conway

2922 South Germantown Road

Germantown, Tennessee 38138

Dear Ms. Conway: RE: Nelson County Probate - Cases #3168 & 3263

This is in response to your letter of December 4, 1987, requesting copies of the docket file of the above listed estates - namely Guy Kjorvestad, Sr. and Selma Kjorvestad. I have stated to you on the telephone that I visited with the present County Judge about this request and that we are in complete agreement that the docket sheet is not considered part of this file. Therefore, I will not send a copy to you. Your personal check #1070 in the amount of

$10.00 is enclosed.

Sincerely,

Audrey I. Swanke, Clerk of Court

Nelson County, North Dakota

NELSON COUNTY CLERK OF COURT

Post Office Box 565

Lakota, North Dakota 58344

Audrey I. Swanke, Clerk Telephone

Susan R. Pederson, Deputy 701-247-2462

Undated letter

C. Nicholas Vogel

VOGEL, BRANTNER, KELLY, KNUTSON, WEIR & BYE, LTD.

P. O. Box 1389

Fargo, North Dakota 58107

Dear Attorney Vogel: RE: Est. Guy Kjorvestad & Selma Kjorvestad
Nelson County Court

This is in response to your letter of December 22, 1987, requesting copies of the docket sheet from the County Court Probate Docket Book. The County Judge for Nelson County and myself consider this office information and not available for public distribution. I do not know if you are familiar with these probates but

the listings are too numerous to copy and really are of value only to this office. Enclosed herewith is your office check No. 14943 made payable to Clerk of the Nelson County Court.

Sincerely,

Audrey I Swanke, Clerk of Court

Nelson County, North Dakota

IN THE PROBATE COURT OF NELSON COUNTY

STATE OF NORTH DAKOTA

IN THE MATTER OF THE

ESTATE OF GUY KJORVESTAD, SR., DECEASED

PETITION TO INSPECT PROBATE FILE,

INCLUDING DOCKET FILE, OF

ESTATE OF GUY KJORVESTAD, SR., DECEASED

Eileen Conway, your petitioner, herein, being duly sworn under oath, deposes and says:

That Guy Kjorvestad, Sr. died on the 27th of January, 1973 and at the time of his death was a resident of the city of Aneta, in the County of Nelson and the State of North Dakota.

That the said Guy Kjorvestad, Sr. left a Last Will and Testament which was presented to the Nelson County Probate Court for probate and admitted by the Nelson County Probate Court on the 15th day of March, 1973. The Estate of Guy Kjorvestad, Sr. is probated under the protect-

ion of the North Dakota Century Code. The State of North Dakota extended the protection of the North Dakota Century Code under the Provisions For Transition of Section 30.1-35-01 of the Uniform Probate Code adopted on July 1, 1975.

That the petitioner is the daughter of Guy Kjorvestad, Sr. and a beneficiary of the decedent's estate. In violation of NDCC 30-20-15, Notices of secret, underground hearings in the Nelson County Probate Court have been withheld from Eileen Conway, an interested party in the Estate of Guy Kjorvestad, Sr. In violation of NDCC 30-20-15, Notices of illegal, secret, counterfeit court orders signed in the Nelson County Underground Probate Court were withheld from Eileen Conway in order to defraud the Estate of Guy Kjorvestad, Sr. and his beneficiary, Eileen Conway.

Section 30-20-01 of the North Dakota

Century Code requires an accounting every six months. Cash assets totally $665,000.00 belonging to the debt-free Estate of Guy Kjorvestad, Sr. have disappeared from the Nelson County Probate Court without a single accounting in fifteen years.

Clerk of Court, Register of Deeds and former Nelson County Probate Judge, Audrey Swanke, and Deputy Clerk of Court, Susan Pederson, have blocked Eileen Conway, an interested person in the Estate of Guy Kjorvestad, Sr., from inspecting the Probate File, including the entries in the Docket File, of the Estate of Guy Kjorvestad, Sr. The Estate of Guy Kjorvestad, Sr. is bankrupt.

That pursuant to the North Dakota Century Code the said Eileen Conway petitions the Nelson County Probate Court that former Nelson County Probate Judge, Clerk of Court and Register of Deeds, Audrey Swanke, and Deputy Clerk of Court,

Susan Pederson, be compelled to allow Eileen Conway to inspect and copy documents filed in the Probate File, including the entries of the Docket File, of the Estate of Guy Kjorvestad, Sr. and permit access to the public records of Nelson County in order to protect her interest in $665,000.00 in cash assets and 3520 acres of farmland belonging to the Estate of Guy Kjorvestad, Sr.

Dated this 4 day of April, 1988.

Eileen Conway

Petitioner

STATE OF TENNESSEE

COUNTY OF SHELBY,

On this day of April, 1988, before me personally appeared Eileen Conway, known to me to be the person who is described in and who executed the within and foregoing instrument and severally acknowledged to me that she executed the same.

Patrick F. MdLaughlin

Notary Public

Shelby County, Tennessee

My commission expires

Amendment 14, Constitution of the United State of America. Section I.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any citizen of life, liberty, or property, without due process of law; nor deny person within its jurisdiction the equal protection of the laws.

Amendment 8, Constitution of the United States of America.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

North Dakota Constitution, Article XI.

Section 5. Unless otherwise provided by law, all meeting of public or governmental bodies, boards, bureaus, commissions, or agencies of the state of any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be open to the public.

Section 6. Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state of any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

Uniform Probate Code. Chapter 30.1-35-01 (8-101). Time for taking effect--Provisions for transition.

1. This title takes effect on July 1, 1975.
2. Except as provided elsewhere in this title, in the effective date of this title:
   a. It applies to any wills of decedents dying thereafter. No provision of this title, however shall be effective to invalidate any will executed prior to July 1, 1975, when that will would be valid under the laws of this state in effect at the time of its execution.

North Dakota Office of State Tax Commissioner.

May 28, 1981 letter regarding tax consequences of deaths prior to July 1, 1975, the date of transition from the North Dakota Century Code to the Uniform Probate

Code:

"In view of the fact that this decedent passed away prior to July 1, 1975, this matter must be processed through the county court as provided for under Chapter 57-37, North Dakota Century Code, which was in force on the date of death."

NDCC 30-20-13. Persons interested may appear on hearing account.--On the day appointed, or on any subsequent day to which the hearing on the report and account of an executor or administrator may be postponed by the court, any person interested in the estate may appear and file his exception in writing to the account, and may contest the same.

NDCC 30-20-15. Account allowed upon proof of notice--Decree must show making of proof--Conclusive evidence of fact.--The account of an executor or administrator must not be allowed by the court until it is proved that notice has been given as is

required by this chapter. The decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact.

NDCC 30-20-01. Accounting by executor or administrator. An executor or administrator of an estate must render to the county court a full account and report:

1. At the expiration of six months after letters testimentary or letters of administration are issued;

2. At the expiration of one year after such letters are issued;

3. At any time required by the court, eithere on its own motion or upon application of any other person interested in the estate.

4. Whenever the administration of the estate is ready for final settlement. The report and account then rendered shall be known as the final report and account.

NDCC 30-20-02. Information required in account.--In submitting any report and account as is provided in section 30-20-01, an executor or administrator must render to the court, under oath, the following information:

1. The amount of money received;

2. The amount of money expended;

3. The amount of the claims presented against the estate and the name of the claimants;

4. The claims paid;

5. All other information necessary to show the condition of the estate's affirs.

NDCC 30-20-07. Person interested in estate may apply for account. Any person interested in an estate, at any time before the settlement of the final account of an executor or administrator, amy present his petition to the county court praying that the executor or administrator be required to appear and render an account as is re-

quired in section 30-20-01, and setting forth the facts showing that it is necessary and proper that such an account be rendered.

NDCC 30-20-14. At the hearing on an account, any matter not concluded on the settlement of any former account, nor upon any other proceeding in court, may be contested by any party interested for cause shown. The court may appoint one or more referees to examine the accounts and make report thereon, subject to the confirmation, and may allow a reasonable compensation to the referee to be paid out of the estate of the decedent.

NDCC 30-20-09. Failure to file report--Order of court--Issuance of attachment. --If any executor or administrator fails, neglects, or refuses, after having been duly cited, to render an account as is required by this chapter or by order of court, the court must:

1. Issue an attachment for contempt against him and require the making of the account; or

2. Revoke his letters as provided by section 30-12-02.

NDCC 30-20-05. Examination of executor or administrator. Vouchers filed.--In rendering an account, an executor or administrator must file the vouchers for all charges, debts, claims and expenses which he has paid. He may be examined on oath tuching the payments, and also touching the property and effects of the decedent, and the disposition thereof. If any voucher is required for other purposes, it may be withdrawn on leaving a certified copy on file, and if a voucher is lost, or for other good reason cannot be produced on settlement, the payment may be proved by the oath of any competent witness.

NDCC 30-12-09. Hearing on petition to settle account.--Allowance--Discharge.--If the court entertains an application for the final settlement of an account of an executor, administrator, or guardian, a citation must issue to all parties interestaed in the estate. At the hearing any creditor or other person interested in may allege cause for denying the application r for the removal of the petitioner and may pray relief accordingly. Upon a trial of the issue, the court, if it determines that the application should be granted, must allow the petitioner to account. After he had accounted fully and paid over all money which is found to be due him to the estate and has delivered over all books, papers, and other property of the estate in his hands as the court directs, a decree shall be made discharging him and revoking his letter. Otherwise the court shall make such de-

cree as justice requires.

NDCC 30-20-04. Compensation provided in will-Not provided in will--Commissions allowed.--An executor or administrator shall receive compensation for the services performed by him in caring for, managing and settleing the estate as follows:

3. An administrator shall receive for his services as such the following commissions on the whole estate accounted for by him, excluding all property not ranked as assets:

(d) On all of the estate in excess of fifty thousand dollars, the administrator shall be allowed such compensation as the court shall deem just and reasonable, but in no event shall it be in excess of two per cent.

NDCC 30-15-09. Supplementary inventory.--Omitted property.--Whenever property is not included in an inventory previously made in the same case comes to the know-

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ledge or possession of an executor or administrator, he, within one month thereafter or within such time as the court orders, must make a supplementary inventory and cause an appraisement thereof to be made and returned in like manner.

N.D. Rules of Civil Procedure, Rule 5.

Service and Filing of Pleadings and other Papers.

(a) Service--When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discover required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need to made on parties in default for failure to appear except that pleadings asserting new and additional claims for relief against them shall be served upon them

in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, whether through arrest, attachment, garnishment, or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of the answer, claim or appearance shall be made upon the person having custody of possession of the property at the time of its seizure.

N.D. Rules of Appellate Procedure, Rule 30.

(a) Duty of Appellant To Prepare and File; Contents of Appendix; Time for Filing; Number of Copies. The appellant shall prepare and file separately bound appendix to the briefs which must contain:

2. the relevant docket entries in the proceeding below:

N.D. Rules of Appellate Procedure, Rule 38.

Damages for Delay.

If the court determines that an appeal is

frivolous, or that any party has been dilatory in prosecuting the appeal, it may award just damages and single or double costs including reasonable attorney's fees.

The North Dakota Rules of Disciplinary, Rule 22.

(a) Complaints submitted to the disciplinary board and the testimony with respect thereto are absolutely privileged and no lawsuit predicated thereon may be instituted.

American Bar Association, Standards for Lawyer Discipline and Disability Proceedings.

Section 8.3. Immunity of Complainants. Complainants should be absolutely immune from civil liability for all communications to the agency, but disclosure of the information to anyone else should not be protected.

N.D. Rules of Civil Procedure, Rule 52(b).

(b) Amendment. Upon motion of a party made not later than 10 days after notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Supreme Court, U.S.
FILED
NOV 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-707 and 88-708

In The

Supreme Court of the United States

October Term, 1988

EILEEN CONWAY,

Petitioner,

vs.

FIRST TRUST COMPANY OF NORTH DAKOTA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Dakota

BRIEF IN OPPOSITION

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30 pp

QUESTION PRESENTED

Does a Petition for Writ of Certiorari to review a decision of the North Dakota Supreme Court affirming an Order of the Nelson County, North Dakota, Court allowing attorney's fees and Personal Representative's fees in a probate proceeding present any federal constitutional issue?

AFFILIATED CORPORATIONS

First Trust Company of North Dakota is a wholly-owned subsidiary of First Bank System, Minneapolis, Minnesota. Other subsidiaries include:

CMB Investment Counselors

FBS Agricultural Credit Corporation

FBS Brokerage Services, Inc.

FBS Card Services, Inc.

FBS Leasing Corporation

FBS Merchant Banking

FBS Mortgage Corporation

FBS Properties Management, Inc.

First Group, Inc.

First Insurance

Matrix Leasing International, Inc.

First Trust, Inc.

First Trust Company of Montana

There are First Bank banking subsidiaries at over 94 locations throughout the states of Minnesota, North Dakota, South Dakota, Montana, Washington and Wisconsin.

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Uniform Probate Code (U.L.A.), p.1 (1988 Supp.) 11, 12

OPINIONS BELOW

Mrs. Conway, the Petitioner, has not provided citations for the reported decisions of the North Dakota Supreme Court involving these estates. Those decisions, and their citations are: *Conway v. Parker,* 250 N.W.2d 266 (N.D. 1977); *In the Matter of Estates of Kjorvestad,* 287 N.W.2d 465 (N.D. 1980); *In the Matter of Estates of Kjorvestad,* 304 N.W.2d 83 (N.D. 1981); *First Trust Company of North Dakota v. Conway,* 345 N.W.2d 838 (N.D. 1984); *In the Matter of Estates of Kjorvestad,* 375 N.W.2d 160 (N.D. 1985); *In the Matter of Estates of Kjorvestad,* 395 N.W.2d 162 (N.D. 1986); *First Trust Company of North Dakota v. Conway,* 423 N.W.2d 795 (N.D. 1988).

JURISDICTION

The Final Judgment and Decision of the North Dakota Supreme Court which is the subject of this appeal was entered June 28, 1988. That decision reviewed a County Court order which dealt only with fees of the Personal Representative of the Estates of Guy Kjorvestad and Selma Kjorvestad and the fees of its attorney subsequent to the Final Report and Accounting. The decision and judgment of the North Dakota Supreme Court which affirmed the Findings of Fact, Conclusions of Law and Order of the Nelson County Court relating to the final account and distribution of the estates was entered October 1, 1985. A decision and judgment of the North Dakota Supreme Court dismissing the appeal of Amended Findings of Fact, Conclusions of Law and Order for Distribution, which included approval of additional fees incurred

as a result of the previous appeal, was entered October 28, 1986.

Mrs. Conway claims jurisdiction under the Fourteenth and Eighth Amendments to the United States Constitution relating to the handling and accounting of the estates. However, the only matter presented by this appeal is the approval of fees for the personal representative and its attorney. No jurisdictional statute is cited.

STATEMENT OF THE CASE

The estates of Guy and Selma Kjorvestad, a farm couple from the small rural community of Aneta, North Dakota, present the most litigated probate proceedings in the history of North Dakota. Guy Kjorvestad died on January 17, 1973. His wife, Selma, died a little more than a year later on May 14, 1974. Their two daughters, Lorraine Parker of Grand Forks, North Dakota, and Eileen Conway of Germantown, Tennessee, were named as joint executrices under the will of Selma Kjorvestad and were appointed jointly for the estate of Guy Kjorvestad.

The concept of joint administration, difficult even with mutual respect and patience, soon dissolved into rancor and dispute between the two daughters. Each daughter then retained her own lawyer. Under the procedures then in effect, appeals progressed from the county probate court to the District Court and from the District Court to the state Supreme Court. In January of 1977, the first appeal to the North Dakota Supreme Court was decided, relating to questions of representation

before the Internal Revenue Service, payment of attorneys' fees and a partial distribution to the heirs.

By May of 1979, due to the disputes and impasse in administration, the Nelson County Court ordered both of the executrices removed. That ruling was later sustained by the District Court and in September of 1980, the County Court of Nelson County appointed First Trust Company of North Dakota as successor representative under a supervised administration as provided by the Uniform Probate Code, as adopted and in effect in North Dakota on July 1, 1975.

In the meanwhile, an appeal of a previous order regarding payment of legal services progressed to the North Dakota Supreme Court which, in January of 1980 denied Mrs. Conway's appeal. In December of 1982 a hearing was had in Nelson County Court upon an interim reconstructed account by the successor Personal Representative and upon interim fees. Orders approving the account and the fees were entered.

On April 29, 1983, a hearing was held in Nelson County Court for approval of amended estate tax filings, payment of previously incurred legal and accounting services and payment of interim fees of the successor Personal Representative and its attorney. An order of approval was entered and, since the appeal procedure had been revised, the order was appealed by Mrs. Conway directly to the North Dakota Supreme Court. That order was affirmed in a decision of the Supreme Court dated February 23, 1984. In December of 1983, another County Court order was entered, after hearing, approving certain disbursements and fees. This order was also

appealed by Mrs. Conway, but the appeal was dismissed by the Supreme Court on motion.

On September 21, 1984, a hearing was held before County Judge Ronald Dosch at Lakota, North Dakota, upon a proposed Final Report and Account by the successor Personal Representative. Mrs. Conway appeared personally and presented extensive objections. Findings of Fact, Conclusions of Law and Order for Allowance of the Final Account and for distribution in each estate were entered by Judge Dosch on October 2, 1984. The orders were appealed to the North Dakota Supreme Court by Mrs. Conway. On October 1, 1985, the North Dakota Supreme Court affirmed the orders and directed that the fees of First Trust and its attorney arising from the appeal, as approved by the County Court, be assessed against Conway's share of the estates.

Upon remand to the County Court, First Trust Company submitted its affidavit as to fees together with proposed amended findings and orders to Judge Dosch with copies served upon Mrs. Conway. The amended findings and orders were approved and signed by Judge Dosch on December 5, 1985. Mrs. Conway appealed the amended orders to the Supreme Court and on October 28, 1986, the Supreme Court dismissed the appeal but held that Mrs. Conway was entitled to a hearing with respect to fees.

First Trust Company then petitioned the County Court for authorization and approval to pay unpaid and future attorney's and personal representative's fees. A hearing was held before County Judge Jonal Uglem on February 10, 1987, at Lakota, North Dakota. Mrs. Conway appeared and made her objections. On February 23, 1987,

Judge Uglem entered her order approving accrued fees and authorizing future payments to the Personal Representative and its attorney. Mrs. Conway appealed this order to the North Dakota Supreme Court. In its opinion and judgment dated June 28, 1988, the North Dakota Supreme Court affirmed the Order, except as to any provision for future fees arising from defending disciplinary complaints against the Personal Representative's attorney which were not sustained, and allowed double costs and attorney's fees of $250.00 against Mrs. Conway.

Mrs. Conway subsequently filed a Petition for Writ of Certiorari in this Court for review of the June 28, 1988, judgment of the North Dakota Supreme Court. She also has written the Clerk of the Nelson County Court requesting a docket file or sheet on the estates which the Clerk declined to provide. Mrs. Conway on April 4, 1988, apparently prepared a Petition to Inspect Probate Files addressed to the Nelson County Court. To our knowledge, the Petition has never been set for hearing, acted upon, nor is there any provision in the court rules or rules of procedure for such petition.

From 1975 through 1984 Mrs. Conway was represented by a succession of twelve different lawyers or law firms. From 1984 to the present she has proceeded *pro se*. She has also filed disciplinary complaints against each of the attorneys representing her sister and the successor Personal Representative. All of such complaints have been denied. She has had her objections heard before four different County Court Judges, two District Court Judges,

and nine different Justices of the five-member North Dakota Supreme Court.

SUMMARY OF ARGUMENT

Mrs. Conway's petition is a repetition of unsubstantiated claims and allegations made against participants in the judicial process over the past fourteen years. In the numerous hearings and appeals over that period of time, no substantial evidence of this "probate crime" and coverup has ever been provided.

There is no federal question for decision by this Court since the most recent appeal dealt only with approval of fees and sanctions for a frivolous appeal. The sanctions imposed, charging her with fees relating to a frivolous appeal were consistent with federal practice and mild in view of the case history. There are no equal protection or due process violations because Mrs. Conway was accorded full and multiple hearings upon her objections under the Uniform Probate Code and the rules of procedure applicable to civil actions in North Dakota.

ARGUMENT

1. Petitioner Presents no Claim of Substance.

It is difficult to frame an intelligent response to an argument which takes as its essential premise the corruption of the entire judicial system of the State of North Dakota. The initial response must be that the judges, lawyers, court personnel and parties involved are not

corrupt and Mrs. Conway has never presented credible evidence of what she consistently describes as "the probate crime of the century."

Justice Meschke of the North Dakota Supreme Court, in October, 1985, when the merits of the final account were actually before the Court, made the following summary of Mrs. Conway's claims:

> Without any references to the record, Conway's "statement of facts" rails against her sister ("manic crime spree;" "embezzled money;" "embezzled bonds, cash, bank money-orders, checks;" "forged" signatures; "illegally redeemed securities and illegally moved $100,668.68 in cash assets;" "looted four safe deposit boes [sic];" "destroyed . . . monthly bank statements to cover-up additional forgeries;" "destroyed all records;" and "embezzled approximately $39,000.00 from the estate"); rails against one prior attorney for the estate ("deceitfully misrepresenting himself;" "defied two court orders," "felonies, fraud, forgeries, theft, embezzlements and a tangled web of falsified records to cover-up the wrong-doing;" "10 years of trama [sic], threats, insults, verbal and non-verbal abuse inflicted" by him on her; his "ruthless, vicious interference;" "conspired;" "concealed;" acted "illegally;" "also practiced deceit;" and "cover-up [of] massive fraud and felonies committed against the estate."); rails against one of her own lawyers ("concocted a scheme;" "lied;" participating in a "fraudulent" report; "fraudulent accountimg" [sic] and a "fraud scheme.") and rails against a prior accountant ("falsified bank deposits to cover-up Parker's embezzlements;" "falsified grain sales;" and "falsified bank account ownership.")
>
> Her unsupported vilification extends to a county judge ("brutally assaulted Conway;" "cover up" of "irregularities;" "illegal court order;), a district judge

> ("[f]alse statements;" "illegal Amendment to Judgment . . . to cover-up the 'doctored' files and the payoffs made to cover up the fraud;") and a clerk of court ("disoriented, hysterical behavior").
>
> She proceeds with scathing accusations against First Trust and those associated with it. She rails that First Trust "breached their fiduciary duty," "committed perjury," "employed perjury, deception, misrepresentation and fraud to cover-up" assets and "committed perjury." She accuses an officer of First Trust of making "thirteen false statements . . . to cover-up" prior "illegal" activities of a lawyer for the estate, and accuses a lawyer for First Trust of "making sixteen false statements . . . to cover-up" such activities.
>
> None of these vituperations are supported by any references to the record. Thus, Conway's presentation is lacking in evidence though lengthy in vilification.

In the Matter of the Estates of Kjorvestad, 375 N.W.2d 160, 164 (N.D. 1985).

Vilification notwithstanding, the Supreme Court proceeded to a careful examination of the procedures followed and actions taken by the successor personal representative.

The reconstructed account for the administration of Mrs. Conway and her sister, the collection of assets, the accounting for assets and the compensation for First Trust and its attorney were all reviewed and found not legally wanting.

2. There is no Federal Question.

As contemplated by Rule 17, Sup.Ct.R., a writ of certiorari will be granted only for special and important

reasons. One of these reasons would be when a state court of last resort has decided a federal question in conflict with the decision of another state or a federal court of appeals. Another would be when a state court has decided an important question of federal law which is in conflict with a decision of this Court or which should be settled by this Court.

The decisions of the North Dakota Supreme Court in this case are simply interpretations of probate law under the statutes and civil rules of North Dakota. The major argument of Mrs. Conway revolves about whether procedures in the estates were governed by North Dakota statutes in effect before or after July 1, 1975.

No federal question was ever presented for decision by the Supreme Court of North Dakota.

There were three issues before the North Dakota Supreme Court: (1) Were the allowances of attorneys' fees and personal representative's fees clearly erroneous? (2) May the county court allow costs of defending unsubstantiated disciplinary complaints as a charge against Mrs. Conway's share of the estates? (3) Was the appeal frivolous, justifying an assessment of costs and fees against Mrs. Conway?

3. Sanctions for Frivolous Pleading and Litigation are Fully Justified.

If there is any cause for wonder about the history of these estates it is not that the North Dakota Supreme Court has applied extraordinary sanctions. Rather, the wonder is that the Court has applied so few and such

minor sanctions for litigation that has been, at least over the past four years, totally repetitive, frivolous and full of libelous allegations. Once the constraints of representation by a member of the bar were removed, Mrs. Conway returned again and again to her basic premise, that her sister and her sister's attorneys had stolen from the estates and everyone thereafter was covering up.

The Court proceeded under Rule 38 of N.D.R. App.Proc., which provides:

> If the court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee, including reasonable attorney fees.

This rule follows closely Rule 38, Fed.R.App.P., applicable to the federal courts of appeal.

Recognizing the burden of frivolous litigation in an already overburdened judicial system, the Federal Civil Rules have increased the standards to be applied and the sanctions to be imposed. Under the most recent amendments:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or

> other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 11, Fed.R.Civ.P.

These directives are consistent with sanctions for failing to make discovery. See Rule 37(b)(2), Fed.R.Civ.P. It is unlikely that a federal district court judge would have exercised the extreme patience displayed by the North Dakota Supreme Court.

4. This Extensively Litigated Probate Proceeding Presents no Equal Protection or Due Process Violation.

The equal protection clause of the Fourteenth Amendment does not assure uniformity of judicial decisions or immunity from judicial error. *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962). Mrs. Conway's claims of error in rulings by the County Court of Nelson County, as reviewed by the North Dakota Supreme Court, present matters well within the sound discretion of those judicial bodies.

Whatever procedures are fair, what state process is constitutionally due, what distinctions are consistent with equal protection, all depend on the particular situation presented. *Cohen v. Hulen*, 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed. 156 (1961).

The Uniform Probate Code, as adopted in North Dakota and applied in these estates, is a product of the

respected National Conference of Commissioners on Uniform State Laws and has been adopted in at least sixteen states. Uniform Probate Code (U.L.A.), p.1 (1988 Supp.). It is far from an aberrant or illconceived piece of legislation.

The Constitution commits to the states the power to control administration of their citizens' estates. *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971); *American Trust Co., Inc. v. South Carolina State Bd. of Bank Control*, 381 F.Supp. 313 (D.S.C. 1974).

It seems questionable that the "excessive fines" provision of the Eighth Amendment is applicable to the states through the Fourteenth Amendment. See *Collins v. Johnston*, 237 U.S. 502, 35 S.Ct. 649, 59 L.Ed 1071 (1915); Annot. 18 L.Ed.2d 1388, 1412. However, the same considerations of judicial discretion under the due process and equal protection clauses would apply. In addition, that provision is addressed to the criminal jurisdiction of the courts rather than the civil proceedings applicable here.

CONCLUSION

The petition for writ of certiorari to the North Dakota Supreme Court presents an interesting case study in how the judicial process in a probate proceeding may be extended, delayed, complicated and made expensive by a determined litigant with substantial resources. This case has already clogged the calendar of the Supreme Court of North Dakota for eleven years. It has no place on the calendar of the Supreme Court of the United States.

Dated: November 14, 1988.

Respectfully submitted,

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